Argument

This is a contract action for earnings admittedly owed but not paid. Defendant's defense is based on its interpretation of federal tax levy statutes and statutes it alleges require wage withholding. Defendant failed to refute any of Plaintiff's arguments in its Brief and primarily relied on unpublished authority and/or cases not in point, as shown below. Defendant attempts to characterize Plaintiff's argument as being that Defendant "acted upon the Notice of Levy in an unconstitutional manner." This is of course a false characterization of Plaintiff's argument. Plaintiff seeks funds due on his contract, and refutes Defendant's affirmative defense. There was no levy for a variety of statutory, case law, and constitutional reasons, and Defendant failed to prove the levy. Defendant is absolutely without defense on the question of whether Plaintiff's earnings were "subject to levy" and on the question of whether her unearned earnings are "property" under Michigan law and therefore under 26 U.S.C. Sec. 6331. Defendant failed to prove that wage withholding was required under 26 U.S.C. Sec. 3402(a)(1).

I. Defendant failed to establish its affirmative defense that it honored a levy on property subject to levy upon demand of the Secretary.

Defendant had the burden of establishing its affirmative defense that it complied with a federal tax levy on Plaintiff's property subject to levy upon demand of the Secretary. Levy requires seizure. Any initial seizure of Plaintiff's property under 26 U.S.C. Sec. 6331 required a proper 4th Amendment warrant, both to seize initially and to distrain – to hold against will,[1] according to the controlling precedent in the 6th Circuit, United States v. O'Dell, 160 F.2d 304 (6th Cir 1947).

Where there is no on-going court proceeding and assuming levy on intangibles is permitted and properly expressed in the governing statute, words of seizure and demand in the notice are not sufficient. O'Dell, *supra,* at 307. No words of seizure or demand were present in the notice of levy in the instant case. The Notice of Levy form in use pre-1954 at the same time as the

Warrant for Distraint, Form 69, Plaintiff's Brief Exhibit K was in use, also used the words "are hereby seized and levied upon." See Exhibit B, from K. Brewster, Distraint Under the Federal Revenue Laws (1937) pp. 138-139. Even if a warrant for distraint, and not a 4th Amendment warrant was all that was required, that standard was not met by the notice of levy in the instant case as no words of seizure or demand were used, see Plaintiff's Brief, Exhibit A. Without the words "is seized and levied upon," no seizure is effected. The O'Dell and other courts, just beginning to see an increase in tax litigation, understood, as they stated, that levy required seizure, and that seizure required a proper 4th Amendment warrant, and as specified by Congress, an executive branch warrant. These courts undoubtedly thought warrants for distraint were proper 4th Amendment executive branch warrants, but couldn't know they weren't (generally not sworn/no averment Constitution complied with), since warrants for distraint were not served in the cases in question. The notice of levy was not part of any required, automatic, on-going judicial process in the instant case.

The government may seize property subject to levy pursuant to a judicially authorized warrant based on probable cause. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).[2] No search authority is authorized under 26 U.S.C. Sec. 6331(b). No Supreme Court cases have reviewed the warrant requirement as to intangible property, and more specifically as to wages, post-G.M. Leasing. G.M. Leasing defined "by any means" very narrowly, including only methods of seizure generally applicable to tangible property. The mode of seizure of intangible property must be specified in the levy statute, and no mode of seizure is specified for the seizure of wages generally in the federal tax levy statutes. See FN 5. Already in the Treasury, the wages of government employees under 26 U.S.C. Sec. 6332(a) do not require search and seizure, and following the initial warrant to establish probable cause, only a notice of levy, as required by the plain language of the statute, need be given. The same pertains to levy "on an organization with

respect to an endowment contract issued by such organization" by notice of levy. Since the Secretary has no authority under the levy statute to search for tangible or intangible property, only such contracts issued by the government for government employees generally may be levied, and the notice of levy finalizes the levy. This interpretation is consistent with the 4th Amendment meaning of "effects," and the 4th Amendment protected interest citizens have in their accounts receivable. After O'Dell and other decisions cited in Plaintiff's brief recognized the warrant requirement, the 1954 Code was drafted continuing (and disguising) the limitations of "the existing law of levy and distraint:" no warrants, no searches or seizures. Of course a warrant requires a sworn statement that the debt is owed, and this no competent government official can do short of perjury.

Defendant produced no notices of lien[3] or notices of seizure[4] in response to the Discovery Order, which required their submission. The lack of a *return* of the seizure was a principle point addressed by James Otis in his great speech against the Writs of Assistance[5] that formed the basis for the 4th Amendment. The law is clear that a tax sale purchaser cannot obtain clear title if the government failed to perfect its right to sell clear title by strict compliance with the provisions for notice of the levy, seizure, and sale. City of Dimondale v. Grable, Mi. Ct. of App. #213277, dec'd 4/21/00; Ruff v. Isaac, 226 Mich. App. 1, 5-6; 573 NW 2d 55 (1997); Goodwin v. United States, 935 F.2d 1061, 1065 (9th Cir. 1991). No proper seizure or levy of Plaintiff's property subject to levy, earned or unearned, was made. No basis exists for arguing that a notice of seizure is not necessary in the case of intangible property. 26 U.S.C. Sec. 6335(a). The date of the levy under 26 U.S.C. Sec. 6502(b) is the date the notice of seizure is given. Notice of seizure is necessary to prevent the IRS from taking recovery exceeding the amount levied against from more than one bank account, when multiple notices of levy are sent

for example,[6] and to ensure the IRS concurs the property was "property" "subject to seizure," and to provide an account of the property taken.[7]

Even assuming that wages may be subject to levy, and *if* the statute specifies the method of seizure for the intangible property, as shown in Plaintiff's Brief, and unrebutted by Defendant, Plaintiff's unearned earnings were not property under Michigan law, and were therefore not "property" under 26 U.S.C. Sec. 6331(a).

To be constitutionally adequate, the *contents* of the notice must give the recipient reasonably full information about his rights. Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1 (1978). Where operative words of seizure and demand are required in the notice, Due Process requires that alleged tax debtors be given an actual copy of the levy process. Here Plaintiff did not receive an actual copy of the garnishee's "process" until she compelled Discovery thereof. Alleged tax debtors cannot possibly know whether a valid levy/seizure has been made, and therefore whether recourse is against the government or against the garnishee. The courts can be expected to be flooded with cases like the instant one as long as current practice persists. The dramatic drop in IRS levies was probably due to the exposure the Williams v. Boulder Dam opinion received when it was handed down and circulated on the Internet in May 1998. Including a copy of the garnishee's "process" in the alleged tax debtor's paperwork is certainly required within the guidelines of Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

> The notice must be such as reasonably to convey the required information…process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. Mullane v. Central Hanover Trust Co., 339 U.S. 314-315 (1950).

In Elfelt v. Cooper, 485 N.W.2d 56 (Wis. 1992), the Wisconsin Supreme Court questioned the Constitutionality of 26 U.S.C. Sec. 6331 as applied:

> We also do not reach Mrs. Cooper's constitutional arguments. Although the U.S. Supreme Court has stated that "[t]he constitutionality of the levy procedure, of course, 'has long been settled,'" *National Bank*, 472 U.S. at 721, 105 S.Ct. at 2925 (citations omitted), we are doubtful of the constitutionality of the actions of the IRS in this case…This diminution in the value of her property interest, without any requirement that she be given adequate notice by the IRS, puts the application of I.R.C. Sec. 6331 into serious constitutional doubt. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795-800, 103 S.Ct. 2706, 2709-2712, 77 L.Ed. 2d 180 (1983). Elfelt, id., at 60.

The Michigan Court of Appeals should issue an opinion making clear that the federal government is not free to spend another fifty years on Rube Goldberg (move-the-"hearing"-from-the-back-to-the-front) Due Process ambiguity experimentation/chicanery where courts in every state will be filled with litigants challenging the effectiveness of extortionary federal "tax" "process" notice failures. See City of Dimondale v.Grable, Ruff v. Isaac, *supra.*

II. Defendant failed to establish its affirmative defense that it honored any law requiring it to withhold wages from Plaintiff

Defendant presented no case law authority for its contention that it was required to withhold from Plaintiff's wages under 26 U.S.C. Sec. 3402(a)(1), and acknowledges that no regulation so requires, not that a regulation could, when no signed wage withholding certificate is in effect as in the instant case. Liability for taxes must clearly appear. Miller v. Standard Nut Margarine, 284 U.S. 498, 508 (1932).[8]

Plaintiff is admittedly due funds now in excess of $20,000 under his employment contract with Defendant.[9] Defendant failed to demonstrate immunity under either 26 U.S.C. Sec. 6332(e) and 26 U.S.C. Sec. 3402(1)(a). Summary judgment for Defendant was therefore improper, that Order must be reversed, and Plaintiff's cause must be reinstated and remanded for further proceedings.[10]

As further relief requested, Plaintiff wishes the court to emphasize that the federal government can, as it has recently done by adding 26 U.S.C. Sec. 6330, change the levy statutes indefinitely and claim any sane precedent established obsolete. May the court please set clear standards for any further "attempted levies," understanding as we do, that there are still 49 other states to go… At a minimum, the standards of Mitchell v. W.T. Grant & Co., *supra*, must be observed. There is no reason a 4th Amendment warrant, executive or judicial, should not be required to seize property, tangible or intangible, under 26 U.S.C. Sec. 6331.

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June 27, 2000 Plaintiff-Appellant

[1]Plaintiff's Brief showed that under the 4th Amendment warrants may be either executive or judicial, and that an executive branch warrant was recognized by United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947), that held that the words "is seized and levied upon" were inadequate where the levy statute allowed sale. O'Dell and cases like it which held levy required seizure arose after World War II vastly increased the number of returns and litigation concerning the "tax": "It wasn't until the dramatic broadening of the tax base during World War II that the IRS found itself desperate for some way to speed up the processing. The sheer number of returns was staggering, having increased *from a mere 6.4 million returns in 1939 to more than 48 million returns by 1945."* Davis, Shelley, "Unbridled Power: Inside the Secret Culture of the IRS," p. 57(emphasis added). The Warrant for Distraint, Form 69, 1933, Plaintiff's Brief Exhibit K, reveals the earlier misconception that one could have distraint without seizure under the levy law: "You are hereby commanded to *levy upon*, by *distraint*, and to sell so much of the goods, chattels, effects…; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to *seize*…the real estate of said person.." (Emphasis added). Distraint was treated as applying to personalty, seizure to realty. The case law subsequently made clear that levy and therefore seizure were required for both personalty and realty, necessarily implicating the 4th Amendment in all cases. The 1954 levy statute clarified this: "Levy includes the power of distraint and seizure by any means." 26 U.S.C. 6331(b) cannot intend distraint as a discrete, complete levy process, but as one part of a whole process. If two separate processes were intended, the plural, *powers* should have been used. Notice of Levy forms in use pre-1954 used the words "and all sums of money owing from you to the said…are hereby *seized and levied upon.."* (Emphasis added). Exhibit B.

Phelps v. United States, 421 U.S. 330 (1974), a bankruptcy case where a notice of levy stated that the cash proceeds in the assignee's hands "are hereby levied upon and seized for satisfaction" of the taxes, "and demand is hereby made upon you for the [proceeds]," id. at 331, used the language United States v. Eiland, 223 F.2d 118 (4th Cir. 1955), said was necessary for a notice of levy to constitute a warrant for distraint, and neither standard, the 4th Amendment warrant, or the warrant for distraint standard, was met in the instant case. "..(A)nd notice of levy and demand are equivalent to seizure." Id. at 337. They are not, however, equivalent to *levy*, which Defendant was required to prove in the instant case. Mr. Justice Brennan relied on the regulation, 26 CFR Sec. 301.6331-1(a)(b), which goes beyond the statute when applied to other than government employee salaries. Phelps held only that constructive, and not actual, possession was necessary under the bankruptcy statutes, and made no holding on the warrant question of O'Dell. The IRS seems to have taken the language of seizure and demand hint and more or less ceased using language of seizure and demand after Phelps, realizing that a 4th Amendment test of the warrant requirement would undoubtedly follow its use.

Phelps was issued after Congress enacted "the Code's summary-collection procedures," United States v. Nat'l Bank of Commerce, 472 U.S. 713, 728 (1984)(refers to notice of levy as "demanding that the bank pay," id. at 716). See

Fed. R. Civ. Pro. "Supplemental Rules for Certain Admiralty and Maritime Claims, A-F, 1966," which may be intended. In Nat'l Bank of Commerce, Justice Blackmun stated, "Crucially, the administrative levy, as has been noted, is only a provisional remedy." Id. at 728. It is of course not disputed that in the instant case the IRS did not attempt to (and has never been seen in the cases to) employ Rule B, "Attachment and Garnishment: Special Provisions," which requires an *in personam action*, an *affidavit* by Plaintiff, and *judicial approval*, to attach "the defendant's goods and chattels, or *credits and effects* in the hands of garnishees to be named in the process…only *if* the Defendant shall not be found within the district." (Emphasis added). Obviously, any contention that the levy process in the instant case may be upheld and that O'Dell and United States v. Stock Yards Bank of Louisville, 231 F.2d 628 (6th Cir. 1956)("Stock Yards Bank concerned an *attempted levy* upon United States savings bonds," Nat'l Bank of Commerce, *supra*, at 728, FN11 (emphasis added)), do not apply, is ludicrous, since a statutory process cannot be saved from unconstitutionality when the process is not employed, and Defendant presented no judicial order in the instant case.

Nat'l Bank of Commerce reasoned that the new 26 U.S.C. Sec. 7426 could be used by third parties to redress intentionally wrongful levies. Unlike the instant case, the Court's holding followed the earlier common law on the issue at stake, the third party "taking" could have been upheld on that basis, and actual use of the Supplemental Rules or failure to use them would not have been necessary to the result. The potential deprivation under the levy law to unnoticed third parties only makes more pressing the necessity of a proper warrant for initial seizure, however. Here, the existence of the Supplemental Rules cannot be relied upon to uphold the allegedly "attempted levy," since they were not used, and the notice of levy obviously does not meet even the judicial order requirements of Rule B. A court would not be expected to issue an order not a warrant in a federal income tax case, even where a proper affidavit shows the defendant is out of the district, because, as shown, the tax statutes define account receivables as *effects*, see Plaintiff's Brief FN26, that are therefore entitled to 4th Amendment protection. See Rule B(3) regarding "compulsory process," where garnishee does not respond, and numerous references throughout the Supplemental Rules to the warrant being given to "a person or organization authorized to enforce it." See Rule C(3).

In Phelps, *supra*, at 337, Justice Brennan noted, "Historically, service of notice has been sufficient to seize a debt," relying on Miller v. United States, 11 Wall. 268, 297 (1871). But Miller, a civil war stock seizure, was decided under the war powers clause and a statute that said the proceedings "shall conform, *as nearly as may be*, to proceedings in admiralty or revenue cases, Miller, id. at 271 (emphasis added). The Court held that constitutional due process protections did not apply in a war powers case, and the 4th Amendment was not raised. (See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), holding the 4th Amendment inapplicable to a search of a U.S. nonresident alien's premises; Mr. Miller would not have been part of "the people" under the 4th.) "The act of Congress does not require that proceedings in confiscation shall conform precisely to those in admiralty or revenue cases, but only "as near as may be." Id. at 295. The Court found that admiralty cases would have allowed the seizure of the stocks as made in the case; it did not find that revenue cases, which, to be in rem were of a criminal nature, would have permitted the notice of seizure as made. Id. at 295-298. "The inquiry is prompted from the supposed analogy of these cases to proceedings *in rem* for the confiscation of property for offences against the revenue laws, or the laws for the suppression of the slave trade. But in these cases, and in all cases where proceedings *in rem* are authorized for a disregard of some municipal or public law, the offence constituting the ground of condemnation inheres, as it were in the thing itself." Miller, *supra*, at 321 (Mr. Justice Field dissenting). The Miller passage cited by Justice Brennan, at 297, only found that Michigan allowed garnishment by notice on *final* process. Id. at 297. Had the case not been decided under the war powers, a 4th Amendment question might have arisen as to the use of the statutory language "of all the estate, property, money, *stocks, credits*, and effects of the person described,.." id. at 296 (emphasis in the original), as the statute, just as Rule B, defines *credits* to be something different from *effects*. In the instant case, Plaintiff clearly has a 4th Amendment protected interest in her earnings, because the applicable tax statute, 26 U.S.C. Sec. 3187 (1939), includes evidences of debt as an effect, and earnings were defined to be "evidences of debt." Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), was not considered, as it naturally should have been, if the Phelps court was considering the O'Dell question, given Mr. Justice Brennan's subsequent statements in footnote in Laing v. United States, 423 U.S. 161 (1976), Plaintiff's Brief pp. 21-23, that there is no lower Due Process standard in tax cases. It is distressing to see that both in Miller, (war powers, no due process constitutional protections) and in Murray's Lessee et. al. v. Hoboken Land and Improvement Co., 18 How. 272 (1856) (collector on his bond, government held joint title to property/4th Amendment warrant requirement not invoked), more safeguards were present than accorded in the instant case, where Plaintiff should have full 4th and 5th Amendment protection. In Murray's there was an affidavit, signed by the solicitor of the Treasury ("by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury", 274 pp.), and in Miller, in war, an

order by a U.S. District Attorney based upon a sworn statement, pp. 274-275. In both cases, the process *was part of a court case where there was judicial supervision*. How is there an issue of proper 5th Amendment notice for jurisdictional purposes in the instant case when the "notice" is not part of process in an ongoing court case? Miller cannot apply. Mr. Miller, an enemy, had more protection than the American "taxpayer." You can't fail to get notice of a hearing, or miss a hearing, when there isn't a hearing. Now there's a Due Process problem.

[2] Defendant also misrelies on Schiff v. Simon & Schuster, Inc., 780 F.2d 210 (2d Cir. 1985). Schiff argued the validity of the underlying assessments, which was not relevant in a suit against his creditor for honoring a levy. On the validity of the levy, Schiff argued only that "the IRS, by using a 'Notice of Levy' form rather than a 'Levy' form, did not properly make a levy upon his property." Schiff at 212. Schiff only questioned the name of the form, and not its substance. The substance, the language of the notice and the requirement of a 4th Amendment warrant to search for and seize accounts receivable was never raised, as it should have been, in post-G.M. Leasing cases. A notice of lien was served with the notice of levy in Schiff. Defendant's reliance on Duane Smith v. Kitchen, 156 F.3d 1025 (10th Cir. 1997) is without basis. Smith raised none of the arguments Plaintiff raises here, concerning the contents of the notice of levy, the warrant requirement, the necessity of a notice of seizure, or the nature of wages as property or as property subject to levy. Smith filed a federal case against bank employees for violation of his rights to due process and other claims (mail fraud, perjury and civil rights conspiracy). Id. at 1027. The unpublished Haggert v. Philips Medical Systems, Inc. et. al., 39 F3d 1166 (1st Cir. 1994), cited by Defendant, relies on cases distinguished by Plaintiff and does not make the argument Plaintiff makes with respect to notices of levy. The unpublished Haggert v. Hamlin et. al., 25 F3d 1994 (1st Cir. 1994) assumes Nat'l Bank of Commerce says more than it says and does not make clear what specific issues Haggert raised – and misses out on the telltale word "accrued," although it is not clear if future earnings were at issue.

[3] "The bank argues that in addition to issuing warrants of distraint and serving notice of levy, it was incumbent upon the government to serve a notice of lien. Cf. United States v. O'Dell, 6 Cir., 1947, 160 F.2d 304, 307; Commonwealth Bank v. United States, 6 Cir., 1940, 115 F.2d 327, 328." United States v. Stock Yards Bank of Louisville, 231 F.2d 628 (6th Cir. 1956).

[4]If there is delay in sending notice of seizure to owner or holder of rights to property levied upon, statute of limitations for collection of tax after assessment will continue to run, rendering tax ultimately uncollectible. In re Dunne Trucking Co., 32 B.R. 182 (Bkrtcy. Iowa 1983).

Defendant is required to prove "the levy, its date, and service." Commonwealth of Kentucky v. Laurel County, 805 F.2d 628 634 (6th Cir. 1986); Resolution Trust Corp. v. Gill, 960 F.2d 336 (3rd Cir. 1992). In re Girard, 57 B.R. 66 (E.D. Mich. 1985) did not raise notice of seizure and assumed notice of levy was a complete levy. As a bankruptcy case, it was a jeopardy case. Defendant relies on the unpublished case of Kimball v. Ford Motor Co. et.al., 802 F.2d 458 (6th Cir. 1986). Kimball is too sketchy on the facts and procedural history to place reliance. The first action, removed by Defendant to federal district court apparently because of Plaintiff's unfounded reliance on deprivation of due process by private defendants, was dismissed under the Anti-Injunction Act, but it is not clear that a 6332(e) defense was ever raised as to the breach of contract claim. In the second filing, Kimball brought suit in federal district court, again on deprivation of property without due process grounds. He argued that 26 U.S.C. 6331(a) applies only to government employees, and that the notice of levy must be "accompanied by a 'court executed Notice of Seizure.'" Kimball, id. at 4.

We are not told whether the language of the notices of levy in Dunne, Girard, or Kimball contained the words "is seized and levied upon" or "demand," as required by Phelps, Eiland *supra*. The District Court in Kimball granted Ford's Motion to Dismiss based on collateral estoppel and the issues in the first suit. The Court of Appeals affirmed the District Court's order. The further comments of the 6th Circuit Court of Appeals therefore appear to be unpublished, non-precedential dicta. The only dicta relevant to the arguments made in this case concern the statement that, "Further, the district court was correct that the Internal Revenue Code does not require a Notice of Seizure or a Warrant of Distraint to accompany a Notice of Levy." Plaintiff here does not contend they do. The notice of seizure should follow the warrant, after the IRS has determined whether the property held meets the statutory requirements, but the initiating process must contain the words "is seized and levied upon" to seize. As shown in Plaintiff's main Brief as reviewed above, courts have treated a notice of levy as a warrant for distraint if the operative language is used. The Kimball court next relies on 26 C.F.R. Sec. 301.6331-1(a)(1). This regulation goes beyond the statute when applied to other than government employees where a notice of seizure is required. The 6th Circuit indicates this question was not in its contemplation when it follows its citation of the regulation with

the statement, "No judicial intervention is necessary." The 6th Circuit was responding only to the argument as made by the Plaintiff, and has never considered the question of the date of the levy raised by Plaintiff in the instant case. The court's next statement shows it did not address what constitutes a complete levy when it says, "A person in possession of the property levied on by the IRS is obligated to forward the property to the government when served with a notice of levy," relying on 26 U.S.C. Sec. 6332 in general. The court assumes the property is "levied on" when the notice of levy is served, and does not address the question Plaintiff in this case has raised under 26 U.S.C. Sec. 6502(b), concerning the date of the levy. When the court next quotes Sec. 6332(d), it refers to compliance with the notice of levy, which is of course nowhere referred to in that section, which requires that a complete levy be made.

[5]H.S. Commager, Documents of American History (1948), pp. 45-47: "James Otis' Speech Against the Writs of Assistance," February 24, 1761, Exhibit B: "Again, these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more; but these live forever; no one can be called to account. Thus reason and the constitution are both against this writ." (As reported by John Adams.) Id. at 47. As Plaintiff showed in her Brief, a seizure is a single act. A levy is a process, which requires a warrant to seize in a constitutional manner, and a notice of seizure to establish the date of the levy, 26 U.S.C. Sec. 6502(b) and make an account of property seized. The levy statute requires a return (notice of seizure), "As soon as practicable after seizure." 26 U.S.C. Sec. 6335(a). Historically, the notice was a notice of *seizure*. "The marshal made *return* to the district attorney that he had seized it…specifying in his *return* the stock-certificate by which it was represented, and describing the *mode of seizure* to have been serving a *notice thereof* personally upon the vice-president of one company, and upon the president of the other." Miller, *supra*, at 292 (emphasis added). The *mode of seizure* as to intangibles, must be specified in the authorizing statute. "Shares or stock in companies can only be seized in virtue of statutory provisions, which prescribe a mode of seizure equivalent to possession." Miller, *supra*, at 326, (Mr. Justice Field dissenting). This is the general rule, which may not apply where a statute says "as near as may be" and constitutional safeguards do not apply. In the instant case, the rule does apply, and no mode of procedure for seizing Plaintiff's wages is specified. While Phelps found constructive possession sufficient, it did not find that the mode of seizure did not have to be specified in a statute. 26 U.S.C. Sec. 6331 specifies no mode for seizing earnings other than those of government employees. Plaintiff contends this is because 26 U.S.C. 6331 does not authorize search, and only the earnings (accrued) of governmental employees can be seized without search. The complete statutory language of the levy statutes is consistent with this interpretation. See, e.g. 6332(b) as to life insurance and endowment contracts, which provides for a notice of levy to finalize the levy. Life insurance contracts of government employees as part of their employment would not necessitate a search. Levy is a very limited remedy. The Supreme Court in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) found that the mode of seizure intended by 26 U.S.C. Sec. 6331(b), "Levy includes the power of distraint and seizure *by any means*, was limited to such things as "transferring title, asportation, immobilization." These are methods for seizing tangible property, not intangibles. Methods for seizing intangibles must be clearly specified. No method for seizing Plaintiff's earned or unearned earnings is specified in the federal tax levy statutes.

The continuing levy provision, 26 U.S.C. Sec. 6331(e) is likely intended to prevent rescue of paychecks, by providing that, "The effect of a levy on salary or wages *payable to or received by* a taxpayer shall be continuous from the date such levy is *first made* until such levy is released under section 6343." See also new 26 U.S.C. Sec. 6331(h). Section (e) bolsters Plaintiff's contention that only *accrued wages* are contemplated, making it necessary to assure that, since successive seizures may have to be used, 26 U.S.C. Sec. 6331(c), rescue is less likely each time, and that even if the taxpayer does take possession of levied pay, it is considered levied. It would be reasonable to make release contingent on section 6343 where a levy is only upon lesser amounts, as accrued earnings would be. If the notice of levy effected a levy, there is therefore a question of material fact as to whether Plaintiff's paycheck of October 23, 1998, was reached by it. Under the Supplemental Rules, Rule B "credits and effects" may be attached in an in personam action upon court order pursuant to an affidavit that the Defendant may not be found in the district. That was not employed here, and no method of attaching specific intangibles is given. These Rules were adopted as consumer due process cases such as Sniadach, Fuentes, and Mitchell made their way through the courts.

[6] 26 CFR Sec. 301.6335-1 provides that notice of seizure shall be given by the revenue officer who issued the notice of levy. While Plaintiff contends notice of levy *is* the counterpart of notice of seizure under the statutes, the agency construction does show both steps are part of the same process (the delegation of authority must appear in a warrant; a warrant *is* the delegation of authority). Requiring the same officer for both functions ensures sums are not levied in excess of amounts claimed. Where the personal property is an account receivable, *something* is necessary to

clearly seize and clearly demand the turnover of the funds, ensuring that duplicate notices far in excess of amounts levied are not "honored".

[7]The alleged tax debtor receives no notice of seizure in the case of intangible property in the hands of another. If there is no notice of seizure required at all in the case of intangible property, as some courts have argued, *see* In re Sigmund London, Inc., 139 B.R. 765 (1992), what proof does one have of the amount to be credited against the alleged indebtedness? In the instant case, Plaintiff has received no acknowledgment whatsoever that amounts held from his earnings have been credited to the purported tax indebtedness, and nothing in the law allows him to compel such funds to be so credited (if he wanted them to be), if there was no levy! See 26 U.S.C. Sec. 6332(d): "Any amount...recovered under this paragraph shall be credited against the tax liability for the collection of which such *levy* was made." (In part, emphasis added). Obviously this cannot be enforced if no levy was made. Also see 26 U.S.C. Sec. 6342(a)(2), which applies to property *sold*, which was *subject to a tax imposed*. *See* 31 U.S.C. Sec. 321(d)(1) & (2): (1) "The Secretary of the Treasury may accept…and use gifts and bequests of property… for the purpose of aiding…the Department of the Treasury…Property accepted under this paragraph…shall be used as nearly as possible in accordance with the terms of the gift or bequest. (2) For purposes of the Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for the use of the United States." See also instructions on the back of the employer's copy of the notice of levy, instructing that checks designate that they are for the levy. Plaintiff appreciates the gift, but doesn't see that he can enforce this section against his purported tax debt even if he wanted to. How can any court claim that a notice of seizure is not an absolute necessity in all cases? (Only if there IS no levy on intangible property). How could tax debtors enter into settlement negotiations without a clear record, account of, what has already been seized? In the instant case, Plaintiff's unearned earnings were not even "property" under 26 U.S.C. Sec. 6331, and as James v. United States, 970 F.2d 750 (10th Cir. 1992), cited at p. 27 of Plaintiff's main brief shows, the IRS would deny jurisdiction if Plaintiff attempted a quiet title action on grounds it is not his property!

[8] Cases cited by Defendant on the issue of wage withholding are unpublished and do not apply to the instant case. Defendant cites Maxfield v. United States Postal Service, 752 F.2d 433 (9th Cir.1984) on the question of duty to withhold wages. Maxfield was removed to federal district court from small claims, so unlike the instant case that is a contract action with a federal question as part of the Defendant's affirmative defense, a federal question must have been presented on the face of the complaint: "Maxfield's assertion that Postal Service 'deprived [him] of his property' in violation of the 5th Amendment"… Id. at 434. Plaintiff Maxfield had a signed wage withholding certificate in effect claiming 15 withholding allowances. When asked to verify the allowances, Maxfield responded that he was "exempt" from all withholding, and the IRS "notified both Maxfield and Postal Service that it had determined Maxfield's W-4 form to be incorrect." Id. at 433. Maxfield is not precedent for the instant case where there was no signed wage withholding certificate in effect. Plaintiff's case is not a case of filing exempt. Crim v. TAD Technical Services Corp, 978 F.2d 1267 (10th Cir. 1992), also unpublished, did not involve an interpretation of 26 U.S.C. Sec. 3402. "Crim filed a complaint pro se alleging that TAD was withholding taxes from his wages in violation of *Sec. 3402(n).*"(Emphasis added). This is the section on filing exempt. Plaintiff's case is not a case of filing exempt. Id. at 3. "The only relief Crim requested specifically was injunctive relief." Id. at 6. Crim concerned Sec. 1581(c) of the Tax Reform Act of 1986, 100 Stat. 2085, 1765, which provided that an employer withhold taxes from an employee's wages at statutory rates if the employee "has not filed a revised withholding allowance certificate before October 1, 1987." Id. at 9-10. The facts of the case are not sufficiently detailed to present the contents of the October 5, 1987 letter, or January 12, 1988 filing. No holding was made on the question of whether one could revoke a wage withholding certificate under Sec. 3402(a)(1) as opposed to under 3402(n). Sec. 3402(n) involves *exemption* from withholding, and not whether one is required to have withholding without a signed wage withholding certificate under 26 U.S.C. Sec. 3402. The employer is the taxpayer under 26 U.S.C. Sec. 3402.

[9]Plaintiff's fact statement referred to his "employment contract." Defendant made an off the wall comment in its brief that this characterization was false. Plaintiff did not describe it as a *written* contract, but it was still an employment contract. Perhaps Defendant's guilt at its flagrant breach of contract in this matter has occasioned denial. Defendant did commit to pay Plaintiff weekly, by noon on Fridays. See Exhibit D.

[10] Plaintiff did not appeal the denial of injunctive relief by the Circuit Court, largely due to the page limit constraint. It is not in issue here, and it is unclear why Defendant raised it. Plaintiff clearly showed, however, that 26 U.S.C. Sec. 7421 would not have barred injunctive relief in this case. Cases such as Miller v. Standard Nut Margarine Co. of Florida, 248 U.S. 498 (1932)(injunction may issue where *item* not subject to tax); Polk v. Page, 274 F.Supp. 128 (1921)(Anti-Injunction Act does not prevent injunction against collection by distraint *before* time for distraint

permitted by statute); Botta v. Scanlon, 288 F.2d 504 (2nd Cir. 1961)(injunction may issue to prevent assessment against individuals not specified in statutes as persons liable for tax without opportunity for judicial review of status before persons' property is seized and sold); and the Pollock case itself, show injunctive relief would have been proper in the instant case.