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No. 06-141

In the

SUPREME COURT OF THE UNITED STATES

John Gary Given Sr. and Michele Louise Given

Petitioners, pre-se

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

Application for extension of time to file
A Petition for Rehearing

John Gary Given Sr. &
Michele Louise Given
Petitioners, pro-se
[redacted]

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CASES:

APPLICATION FOR EXTENTION OF TIME
TO FILE PETITION FOR REHEARING
DOCKET NO. 06-141

Associate Justice Anthony M. Kennedy
Untied States Supreme Court
United States Court of Appeals for the Ninth Circuit

The Honorable Justice Kennedy,

Pursuant to Rule 30.3 of the current Rules of the Supreme Court my wife and I, being pro-se litigants in an action brought against the United States, respectfully request an extension of time to file a Petition for Rehearing. Due to our financial conditions we are not able to obtain the services of a qualified law firm and therefore pray for the court's understanding in our attempt to convey our position and the reasoning for it. We have continued to pay the income tax and are not protesting the taxation of income. In fact, we acknowledge that Congress has the authority to tax income. But that authority is not without limits, as point out in the recent opinion of Justice Ginsburg (*Murphy and Leveille v. IRS & U. S. A.*, DC Circuit No. 05-5139, August 22, 2006, page 17)

We are seeking clarification of our status (classification) for tax purposes and have followed the rules laid down by the Treasury Department for doing so (26 CFR 601.201 (a) and (e) (1), (2)). Our request for

determination of status was not answered and we were assessed frivolous penalties just for asking. The Department of Justice has refused to meet with us or answer our complaint, apparently with the blessing of the District Court (FRCP, Rule 16-10, Local Rule 16-11). This lack of response leaves us in a vacuum of doubt as to our true relationship with Title 26 and the statutory assessment of taxes upon our income (wages).

The District Court, relying on the Department of Justice's assessment of our position granted judgement in favor of the United States (pages 4a to 9a of our Petition for Writ of Certiorari).

Their assessment of our contention is flawed. We did not claim that our wages "are not income," in fact, we have always maintained the opposite opinion. The problem lies with the fact that there are two legal definitions for that term recognized by the Supreme Court (*Lukhard v. Reed*, 481 U.S. 368, 374-76 (1987)). The 16th Amendment is predicated upon the term "income" being the "gain derived from," not the receipts (income) produced by, capital, labor, or both combined (accessions to wealth clearly realized). Again, as pointed out by Justice Ginsburg: "The Sixteenth Amendment simply does not authorize the Congress to tax as "incomes" every sort of

revenue a taxpayer may receive. As the Supreme Court noted long ago, the "Congress cannot make a thing income which is not in fact so." That opinion goes on to point out that the power to tax incomes extends only to the "gains" or "accessions to wealth" and that a mere "return of capital" is not income within the meaning of the Sixteenth Amendment.

What about the property called "labor"? Isn't it of more value than capital, yet capital cannot be taxed. We believe this question was raised and disposed of in 1895 with the Supreme Court's opinion rendered in *Pollock v. Farmer's Loan and Trust* 158 U.S. 601, 625-626 and that Court's definition of what a "direct tax" was in the Constitutional sense. They, citing 3 Hamilton's Works, 34, said:

> *"He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such, falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in reference to contracts with citizens of a foreign country, said: "This principle, which seems critically correct, *would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction without the beneficial use of it. In many cases indeed, the income or annuity is the property itself."*

The Supreme Court, in that case, did not make a distinction between capital and labor, for both are recognized as being property. What they did say is:

> *"We have considered the Act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from businesses, privileges or employments, in view of the instances in which taxes on business, privileges, or employments, has assumed the guise of an excise tax and been sustained as such."* (158 U.S. 601, 635)

We have not found, or been informed of, any such cases relating to the common law employee (laborer). Those cases that did "sustain" the excise tax all turned upon the principle of the "doing of business," or advantage of privilege, not the mere performance of "labor" ("Taxing the Exercise of Natural Rights," Harvard Legal Essays, 1934).

Justice Field, in his concurring opinion rendered in 111 U.S. 746, 756-758, *Butcher's Union Co. v. Crescent City Co.* cited the works of "Smith, Wealth of Nations, book 1, c. 10" as expressing the foundation of human existence. He quoted: "*the property which every man has is his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.*"

Man's ability to labor is a gift from our creator, it was recognized as such by our founding fathers in the Declaration of Independence. There is no "cost basis" associated with it, it is ours to use for our own benefit and support. Did Congress dare to levy a tax upon the creator, through an excise tax imposed upon all the labors of his creation? We think not, there must be another answer. The Constitution was not written to protect with one hand the property of the capitalist and slaughter with the other hand the property of the laborer. This principle of construction was recognized by the Supreme Court in *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369. As pointed out by Justice Ginsberg: "it would not be consistent with our constitutional government, and the sanctity of property in our system, merely to rely upon the legislature to decide what constitutes income."

Justice Pitney, in discerning the application of the Sixteenth Amendment in *Eisner v. Macomber*, 252 U.S. 189, 206 (1919) said:

This Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that requires an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the court."

We believe the federal income tax is a business or commercial excise tax, because, it is not a "capitation tax" imposed directly upon the common laborer, under the Sixteenth Amendment. It was formulated that way in conformance with the Constitutional restraint placed upon the taxation of people, as well as property, found in Article 1, Section 9, clause 4 of the U.S. Constitution, and the Sixteenth Amendment. As such, the excise involves the principles of "classification," both as to subject matter, as well as those upon whom the tax operates (*Billings v. People of the State of Illinois*, 188 U.S. 97, 102 (1903)):

> *"Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a grocer's purpose. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification-indeed all classification- must primarily depend upon the purpose-the problem presented. Science will have one purpose, business another, and legislation still another."*

Congress selected that "classification" in 1913 and they have not seen fit to change it (*Commissioner v. Tellier*, 383 U.S. 687 (1966)). In an

explanation of the Revenue Act of Oct. 3, 1913, by Thomas Gold Frost ("A Treatise on the Federal Income Tax of 1913)," stated in Sec. 3, pg. 2:

"In construing the various provisions of the Federal Income Tax Law of 1913, it should be borne in mind that successive acts of Congress on the subject of income taxes are to be construed in pari materia. (U.S. v. Smith, I Saw. 277)).

The Federal Income Tax, according to Congress in 1913, is a tax laid specifically upon "net income," not the receipts from which that income is derived. Senator Cummins explained the meaning of "net income", as pertaining to the Revenue Act of Oct. 3, 1913, on page 3844 of the August 28, 1913, Congressional Record. He stated:

> *"Why, Mr. President, should Congress attempt to do more than is declared in the first section of the proposed bill? It is right; it is comprehensible, it embraces everything—no, I will withdraw that; it does not embrace the full power of Congress, because Congress can levy a tax upon gross incomes if it likes; it may diminish the extent of the taxing power or not exercise it at all; it may exclude certain things from the taxing power that it might include; but it can not change the character of the taxation; and when it is declared in the first lines of this bill that a tax is levied upon the entire net income of all the citizens of the country, we have exercise all the power we have."*

Congressman Hull, the author of the 1913 Revenue Act, made this statement recorded on April 26, 1913, page 505 of the Congressional Record:

> *"In any event, the proposed tax is measured by net profits, or gains, and is not imposed upon gross income nor capital, nor other property. If a citizen has not been successful in his efforts to accumulate profits he is not required to pay the tax, but if he has prospered he is required to contribute to his Government, not the scriptural tithe, but a small percentage of his net profits."*

Congressman Hull's explanation of the proposed Revenue Bill is found on page 506. The term "net-income" is a reference to business and commercial activities producing gains and profits; it is not a reference to the common laborer's paycheck, as though that paycheck represented the most profitable business in the world.

Justice Brewer in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 159-160 (1897) addressed the issue of "classification" in relation to the fundamental law:

> *"The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, [165 U.S. 150, 160] that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or may be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be*

had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rest more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

These statements of truth must have been heavy on the mind of the Secretary of the Treasury when he issued Treasury Regulation 45 in 1918. Article 21 of that Regulation provides that:

"Though taxable net income is wholly a statutory conception it follows, subject to certain modification as to exemptions and as to some of the deductions, the lines of commercial usage. Statutory "net-income" is, subject to these modifications, commercial "net-income."

Article 71 of that same Regulation sets forth items of income, which are not included in gross income. It states:

"Gross income excludes the items of income specifically exempted by the statute and also certain other kinds of income by statute or fundamental law free from tax."

The only "income" identifiable as being excluded by the fundamental law would be the "whole income" or annual receipts of the property, that is, both capital or labor; to which the Supreme Court in 1895, assigned the classification of a direct tax requiring apportionment. We find no record of the Supreme Court changing that definition.

In other words, we see no difference between the tax being laid upon our annual wages (whole income) and the definition of a "direct tax" under the Constitution. Nor do we see Congress avoiding that "classification" by having the ability to create a statutory presumption implying that our gross wages are "commercial net income" in conformance with the statutory language of Title 26 and the Sixteenth Amendment. (*Heiner v. Donnan*, 285 U.S. 312, 329 (1932).

If we are allowed to proceed with our suit we intend to show, through the House and Senate Committee Reports and the implementing Regulations, that the federal income tax is strictly a business excise tax. That the tax is imposed upon commercial net income, not "wages" (whole income), and that Congress did provide for the exclusion of "wages," which were not "commercial net income," in conformance with the fundamental law. We cite *Kmart Corp. v. Cartier Inc.*, 486 U.S. 281, 291-292 (1988):

"In determining whether a challenged regulation is consistent with the statute it implements, courts must ascertain the statute's plain meaning by looking to the particular language at issue and the language and design of the statute as a whole."

In Brief:

The Revenue Act of 1940 (H.R. 10039) changed the basis of filing tax returns from "net income" to "gross income," but did not change the basis of the excise tax from "net income" to "gross income".

The Revenue Act of 1941 (H.R.5417) created "Supplement T," the optional tax measured by "certain gross incomes," but did not change the excise tax from "net income" to "gross income".

The Revenue Act of 1942 (H.R. 7378) imposed what Congress called a "Victory Tax" (Subchapter D of Chapter 1), wherein they defined "victory tax net income" as being, in effect, commercial net income plus employee wages (gross income"). But, again, they did not change the excise tax from "commercial net income" to gross income".

The Current Tax Payment Act of 1943 (H.R. 2570) renumbered the Tax Code sections and moved Subchapter D of Chapter 1 to Subchapter D of Chapter 9 "Employment Excise Taxes," and still did not change the excise tax from "commercial net income" to "gross income". They did, however, provide for the "honest mistake" as to liability for the tax imposed under Chapter 1 created by 20 million plus employees filing W-4 Certificates.

The Individual Income Tax Act of 1944 (H.R. 4646) repealed the "Victory Tax" and in its place substituted "adjusted gross income" under

section 22 (n) of Chapter 1, again not changing the excise tax from that of "commercial net income" to "gross income".

Internal Revenue Code of 1954 (H.R. 8300) revised the entire format of the Tax Code without changing the "character of the excise tax for that of "commercial net income" to "gross income".

The Tax reform Act of 1969 (H.R.13270) 83 Stat. 487, Public Law 91-172, December 30, 1969, pg.707 (f) added subsection (n) to section 3402 of the Tax Code: "Employees incurring no income tax liability".

Respectfully submitted for your consideration,

[redacted]

John Gary Given October 16, 2006

[redacted]

Michele Louise Given October 16, 2006

Petitioners, pro-se

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