IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GARY GIVEN, Sr., and MICHELLE LOUISE GIVEN,	)	
Plaintiffs-Appellants	)	
v.	)	No. 05-55954
UNITED STATES OF AMERICA,	)	
Defendant-Appellee	)	

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE AND AND SUSPENSION OF THE BRIEFING SCHEDULE

Pursuant to Rule 3-6 of the Rules of this Court, the United States of America, appellee herein, by its counsel, respectfully moves for summary affirmance of the District Court's grant of summary judgment in favor of the United States. The United States also requests that the date for filing its answering brief, currently November 7, 2005, be suspended pending a ruling on this motion.

STATEMENT

During the taxable years 1997, 1998, and 1999, John Gary Given and Michele Louise Given (taxpayers) had the following amounts withheld as income tax paid on their wages: [redacted]

respectively. (Doc. 1 at 10; ER 7; ER 44.)[1] Taxpayers filed a Form 1040X, Amended U.S. Individual Income Tax Return, for each of the years in issue, on which they requested refunds of the amounts withheld, and on which they typed on Line 21 (Other income): "Wages not subject to income tax per attachment A." (Doc. 17, Ex. A at 6, 9, 12.) In taxpayers' Attachment A they stated, in part, that they "question the application of an 'income tax' levied upon gross receipts (wages)," and they contended that they did "not fall under the definition of 'person' provided by 26CFR301.7701-1, 2, 3, or 6 or 26CFR31.0-2(a)(8)." (Doc. 17, Ex. A at 11.) The Internal Revenue Service (IRS) denied the refund requests and assessed a $500 frivolous return penalty for each of the three amended returns filed by taxpayers. (Doc. 17, Ex. B.)

On January 21, 2004, taxpayers filed a complaint in the United States District Court for the Central District of California, which they

---

[1] "Doc." references are to the documents in the original record of the District Court, as numbered by the Clerk of that court. "ER" references are to documents in the Excerpts of Record filed by taxpayers along with their opening brief.

styled as a suit for refund under § 7422(a) of the Internal Revenue Code (I.R.C.) (26 U.S.C.). (Doc. 1.) In their complaint, taxpayers asserted, in essence, that the government had no right to collect tax on their wages. Taxpayers stated, for example (Doc.1 at 6; ER 3):

> Common labor, in the employ of another, is an inalienable right "To take, hold, and dispose or [sic] property, both real and personal." Therefore, absent the enjoyment of specific "privileges," common "labor for hire" cannot be made the subject of an excise, without infringing upon the right to contract.

Taxpayers requested a refund of all of the taxes withheld from their wages during 1997, 1998, and 1999, with interest, extinguishment of the frivolous return penalties, and litigation costs. (*Id.* at 10-11.)

The District Court granted summary judgment in favor of the United States, and entered judgment accordingly. (Doc. 23 (ER 44); Doc. 24 (ER 48).) The District Court agreed with the position of the United States that taxpayers' contentions were "specious and that the case law is both abundant and unequivocal in its renunciation of the principle that wages earned from personal services are not income." (ER 46.) The District Court held that taxpayers "fail to articulate a valid legal basis for the claim that wages are not income," and that the

United States was therefore entitled to judgment as a matter of law. (ER 46.) The District Court also affirmed assessment of the frivolous return penalties, relying on this Circuit's case law holding that the argument that wages are not income is a frivolous one. (ER 47.)

DISCUSSION

Summary disposition of an appeal is proper where "one of the parties is clearly right as a matter of law so that there can be no question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Under Local Rule 3-6 of this Court, summary disposition is appropriate where "it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings." *See alsoWalczak v. EPL Prolong, Inc.*, 198 F.3d 725, 728 and n.2 (9th Cir. 1999). As we will demonstrate, taxpayers' appeal is so completely lacking in foundation that summary affirmance of the district court's judgment is warranted.

Taxpayers are requesting the refund of federal income taxes that were withheld from their wages by "honest mistake" (Br. 4) on the basis

that their wages are not subject to income tax. Although they maintain that their argument is *not* that wages are not income, all of their contentions amount to the same thing. On appeal, taxpayers contend (Br. 2) that their argument is that "our wages, as our annual receipts (whole income), do not constitute 'commercial net income' in accordance with the statutory 'classifications' selected by Congress." Taxpayers also state (Br. 2) that "[t]he Federal Income Tax is a business excise, not a 'capitation, or other direct, tax'." Taxpayers summarize their position as follows (Br. 5):

> Appellants assert that their wages are their annual receipts, the whole income produced by their property "labor". [sic] As such their wages do not fall within the classification of "commercial net-income," in compliance with the requirements of Subtitle A, and the Sixteenth Amendment.

As this Court has expressly stated, "[w]ages are income" (*Wilcox v. Commissioner*, 848 F.2d 1007, 1008 (9th Cir. 1988)), and "[t]axpayers' claim that their wages are not income is frivolous." *Gattuso v. Pecorella*, 733 F.2d 709, 710 (9th Cir. 1984). Arguments such as the one advanced by taxpayers here have been rejected by this Court and others on countless occasions. *See, e.g., United States v. Romero*, 640

F.2d 1014, 1016 (9th Cir. 1981) ("[c]ompensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to income tax laws currently applicable"); *Carter v. Commissioner*, 784 F.2d 1006, 1009 (9th Cir. 1986) ("The assertion that proceeds received for personal services cannot be given a 'zero-basis for the purpose of assessment of taxation" . . . is a variation on the 'wages are not income' theme, which has been rejected repeatedly by this court."); *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986); *Stelly v. Commissioner*, 761 F.2d 1113, 1115 (5th Cir. 1985); *Funk v. Commissioner*, 687 F.2d 264, 265 (8th Cir. 1982). It has long been settled through "clear, unambiguous, dispositive holdings" that contentions that wages are not income subject to federal income tax are "manifestly and patently frivolous" (*Capps v. Eggers*, 782 F.2d 1341, 1343 (5th Cir. 1986)), "stale" (*Lonsdale v. Commissioner*, 661 F.2d 71, 74 (5th Cir. 1971)), and "fatuous" (*Romero*, 640 F.2d at 1016)). Indeed, the raising of such an argument as "wages are not income" has also been the basis for sanctions against an appellant.

E.g., *Wilcox*, 848 F.2d at 1009. Taxpayers' appeal, based solely on this baseless argument, is therefore wholly without merit.

CONCLUSION

For the reasons stated above, this Court should grant this motion for summary affirmance of the District Court's grant of summary judgment in favor of the United States and entry of judgment against taxpayers. In addition, the appellee requests that briefing be suspended until the Court has decided this motion.

Respectfully Submitted,

EILEEN J. O'CONNOR
Assistant Attorney General
[redacted]
JONATHAN S. COHEN (202) 514-2970
RANDOLPH L. HUTTER (202) 514-2647
Attorneys
Tax Division, Appellate Section
Department of Justice
Post Office Box 502
Washington, D.C. 20044

NOVEMBER 2005