UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Gary Given Sr. & Michele Louise Given
Appellant/Petitioner — CASE NO.

vs. — 05-55954

United States of America
Appellee/Respondent

APPELLANT'S OR PETITIONER'S INFORMAL BRIEF

1. Jurisdiction

   a. Timeliness of Appeal or Petition

      (i) Date of entry of judgement or order
      Of district court: 05-25-05

      (ii) Date of service of any motion made after judgement
      (other than for fees and costs)

      (iii) Date of entry of order deciding motion:

      (iv) Date notice of appeal or petition filed: 06-21-05

      (iv) For prisoners, date you gave notice of appeal
      To prison authorities:

   b. IF POSSIBLE, PLEASE ATTACH ONE COPY OF EACH OF THE FOLLOWING:

      1. The order from which you are appealing
      2. The district court's entry of judgement
      3. The district court docket sheet

2. What are the facts of your case?

We have been addressing our concerns to Congress, the Treasury Department, and the Internal Revenue Service since 1995 and as of this date; we have not received any contradictory answers to our allegations. (Docket No. 20, Excerpts of Record, pages 35-43) We filed suit for refund expecting that action would produce meaningful discussions, refuting our position on the statutory application of the federal income tax. (Docket No. 1, Excerpts, pages 1-7) We were wrong. The Department of Justice, as allowed by Local Rule 16-11, refused to even discuss our case, choosing instead to cite unrelated case law specifically designed to imply that we are "tax protestors". (Docket No. 4, Excerpts pages 8-9; Docket No. 13, Excerpts pages 12-26; Docket No. 17, Excerpts pages 29-31; Docket No. 23, Excerpts page 46 fn-2) Yet, we have continued to file our tax returns and pay the tax shown thereon.

The district court, without addressing our allegations, reviewing our evidence, or providing any reasons for ignoring the legislative history we presented, awarded summary judgement to the United States based upon the erroneous statements made by the Department of Justice. (Docket No. 23, Excerpts pages 44-47) [FN-16]

Our argument <u>is not</u> that "wages received for personal services are not income," but rather, that our wages, as our annual receipts (whole income), do not constitute "commercial net income" in accordance with the statutory "classifications" selected by Congress. (Docket No. 1, Excerpts page 1-6, paragraphs 10,11,13,14,15,16,17, 21,22 & 23; Docket No. 10, Excerpts pages 10-11, paragraph (a); Docket No. 13, Excerpts pages 12-26; Docket No. 16, Excerpts pages 27-28, paragraph (1); Docket No. 20, Excerpts pages 32-34)

The Federal Income Tax is a business excise, not a "capitation, or other direct, tax". As such the operation of the excise is upon the activity or privilege, not the human being engaged in those things. The amount of tax is then measured by the amount of "gain" (net income) derived from the receipts (income) produced by those endeavors. Personal living and family expenses are not deducted from the commercial receipts, because such expenses have nothing to do with the activity or privilege

producing those receipts. The "personal exemption," allowed by section 151 of the Code, is the only statutory provision preventing the excise imposed upon the activity or privilege from becoming a "direct" tax upon the human being engaged in the business or financial transaction. (Docket No. 1, Excerpts pages 2-3, paragraphs 14, 15: Docket No. 13, Excerpts page 26, footnote 27) [FN-1]

Congress recognized, in 1943, that not all "wages" constituted "compensation for services" (commercial net income), the classification of "income" selected by Congress. Nor did all forms of labor fall within the meaning of rendering "personal services" (through and by means of which any business, financial operation or venture is carried on), in compliance with the subject classification selected by Congress. The Treasury Regulations implemented from 1918 (Regulation 45) to 1953 (Regulation 118) specifically provided for the exclusion of "income" exempted by operation of the fundamental law, i.e., a tax placed upon the annual receipts ("whole income") of property (capital or labor), in accordance with the Pollock Decision. Therefore, in 1943, Congress, through a change in the provisions for refunding overpayments, acknowledged that not everyone filing a W-4 Certificate was liable for the excise, regardless of the amount of money withheld from their paycheck (Docket No. 20, Excerpts page 34, paragraph 5).

The cases cited by both the Department of Justice and the District Court are off base, in that they do not address the statutory issues we are raising.

U.S. v. Ball Construction Co, 355 U.S. 587, 589-595 Dissenting Opinion (1958): "We believe those cases are not on point, nor in any way controlling. Neither of them even involve either the question here presented or the statute here conceded by the parties to be controlling. Rather, they involve entirely different facts, presented very different questions, and were controlled by and decided upon other statutes."

It is the substance of the excise, in relation to the "classifications" selected by Congress that must control the taxability of "income" received by the human being.

Our ALLIGATIONS and footnotes are attached as pages 9-26

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3. What did you ask the district court to do (for example, award damages, give injunctive relief, order your release form prison, etc)?

1. Refund the taxes paid in 1997, 1998 and 1999, as such taxes were paid by "honest mistake" as to the liability for the excise imposed by Subtitle A. (With interest as allowed by 26 USC 6611 (a) (2) and 26 USC6621)

2. Extinguish the frivolous penalty erroneously assessed under 26 USC 6702 (a) (1) and (2), or prove to the court that our request for refund falls within the requirements of both subsection (1) and (2).

3. Award plaintiffs reasonable litigation costs, as allowed by 26 USC 7430 (a), for respondents failure to respond to our request for a appeals hearing, as stated in allegation number 5.

4. Provide to plaintiffs a clear and concise instruction on the proper procedures, and requirements, for filling out and filing the W-4 certificate, so as to avoid mistakes as to liability within the intent of 26 USC 6401 (c).

4. State the claim or claims you raised at the district court.

1. Appellants assert that they have filed their tax returns and paid their income taxes by "honest mistake," as provided for by Congress in 26USC6401(c) (1996). That such taxes are to be refunded in the same manner as overpayments per 26USC6402. And that our claim for refund was timely and properly filed. (Complaint, paragraphs 2, 3 and 4; Legislative history of the Current Tax Payment Act of 1943, H.R. 2570, section 4(d))

2. Appellants assert that they do not fall within the specific classification of "persons" selected by Congress, as defined in 26CFR301.7701-1, -2, -3 and 26CFR31.0-2 (a) (8), therefore their labor (property) is not subject to the excise imposed upon commercial activities and privileges by Subtitles A and C. (Docket No. 1, Excerpts pages 2-5,

paragraphs 13, 14, 15, 17, 18, 19, 20; Docket No. 20, Excerpts pages 32-34, paragraphs 1, 3)

3. Appellants assert that their wages are their annual receipts, the whole income produced by their property "labor". 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. (Docket No. 1, Excerpts pages 1-6, paragraphs 11, 13, 16, 21, 22, 23; Docket No. 20, Excerpts pages 33-34, paragraphs 2, 4, 5 and 6)

> SEC v. Sloan, 436 U.S. 103, 118-123 (1978): "The construction put on a statute by the agency charged with administrating it is entitled to deference by the courts, and certainly that construction will be affirmed if it has a 'reasonable basis in law'. (Citations omitted) But the courts are the final authorities on issues of statutory construction, (citations omitted) and 'are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

> U.S. v. Vogel Fertilizer Co., 455 U.S. 16 (1982): "(a) Since the Regulation was promulgated only under the Commissioner of Internal Revenue's general authority to prescribe all needful rules and regulations, it is owed less deference than a regulation issued under a specific grant of authority to define a statutory term. Moreover, the Regulation purports to do no more than add a clarifying gloss on a term already specifically defined by Congress."

5. What issues are you raising on appeal?

The court below erred by not reviewing the Legislative history of the Revenue Acts passed by Congress from 1940 to 1954 [FN-16].

The order in which those requirements were imposed and the deficiencies they were intended to correct, viewed from the position of the statutory intent to tax all commercial gains, may have complied with the Constitutional requirement of Due Process. However, the mandatory requirement that every employee file a W-4 Withholding Certificate created an irrebuttable presumption that every employee was "in the business" of earning their pay and therefore subject to the excise impose

upon "commercial activities" and privileges. Title 26 deals with taxpayers, "through and by means of which any business, financial operation or venture is carried on," it does not deal with non-taxpayers, i.e., those outside the "classification" selected by Congress. The mandatory withholding of money, under the guise of being a "tax," created the irrebuttable presumption that everyone became a "taxpayer." [FN-3]

Whereas, Congress certainly has the right to impose such requirements that will lead to the proper enforcement of the laws, they do not have the power to include within those requirements subject matter, which is outside the law, simply to make their enforcement effort less burdensome. Our position is not that our "wages" are not income, but rather, that our wages constitute our whole income and therefore, as such, are outside the "classification" of "commercial net income" selected by Congress. Unless the common law "labor for hire" employee is in fact a distinguishable commercial entity "through and by means of which any business, financial operation or venture is carried on," their labor is property, not commercial enterprise. The money received for that property is the annual receipts produced by that property and unless those receipts are "includible" in other forms of commercial gross income they are not, by themselves, taxable under Subtitle A. [South Carolina v. Baker, 485 U.S. 505, 516 (1988)]

6. Did you present all these issues to the district court?

Yes

7. What law supports these issues on appeal? (You may, but need not, refer to cases and statutes)

26 CFR 601. 106 (f) (1) (1996), Rule 1: "An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution." (Civil Docket No. 1, paragraph 24)

Unless the common law, labor for hire, employee's gross annual wages fell within the definition of commercial net-income in 1943, or those "wages" could have logically been included in the commercial net income of their spouse, those "wages" represented their annual receipts. Such "wages," as annual receipts, were thereby exempt from tax by operation of the Statute as a whole. Congress has never seen fit to change the Statute from that of an excise upon "commercial net income," nor have the people of this Country adopted a Constitutional Amendment converting the "inalienable right to labor" into a privilege taxable by the Federal Government. (Docket No. 13, Excerpts pages 12-26)

26USC6401(c) (1996): Rule where no tax liability:
"An amount paid as tax shall not be considered not to be an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid."

Legislative history: Current Tax Payment Act of 1943, H.R. 2570, section 4(d), 57 Stat. Vol. 1, chapter 120, pg. 140; page 48 of the Conference Report Number 510, May 28,1943.

"Rule where no tax liability.

Section 4 (d) of the Senate Bill adds new subsection (c) to section 3770 of the Code. Under this provision an amount paid as tax shall not be considered not to constitute an overpayment solely because there was no tax liability in respect of which that amount was paid.

The income-tax law requires the taxpayer to make a return of his tax and to pay the tax so returned. These requirements contemplate that in the discharge of these duties at the time, place, and manner proscribed, honest mistakes will occur-—mistakes both as to the amount of the tax and as to the existence of any tax liability; and that such honest mistakes made incident to the bona fide orderly compliance with the actual or reasonably apparent duties of the taxpayer are to be corrected under the provisions of law governing overpayments. It is believed that existing law so provides. The

language of certain court decisions (holding that certain payments, not made incident to a bona fide and orderly discharge of actual or reasonably apparent duties imposed by law, are not overpayments and accordingly that interest is not payable) has been read by some as meaning that no payment can result in an overpayment if no tax liability actually existed. It is not believed that such reading is in any way a statement of existing law. The provisions of the bill, however, emphasize the need for clarity in this regard.
Under the bill as passed by the Senate, two requirements become basic features of the income tax: (1) The declaration and payment of the estimated tax; and (2) the withholding and collection by the employer of tax from the wages of employees, and the return and payment as such of the amount by the employer to the Government. Honest mistakes incident to faithful and orderly compliance will, of course, occur, just as they have in the older procedures of the tax. …"

8. Do you have any other cases pending in this court? If so, give the name and docket number of each case. NO

9. Have you filed any previous cases, which have been decided, by this court? If so, give the name and docket number of each case. NO

10. For prisoners, did you exhaust all administrative remedies for each claim prior to filing your complaint in the district court?

DATE: September 30, 2005 SIGNATURE

John Gary Given Sr.

SIGNATURE

Michele Louise Given

[redacted]

In a federal tax statute, imposed under Article 1, Section 8, of the Federal Constitution and which is based upon self-assessment, one can not be required to assume they are made liable for the excise upon “commercial activities and privileges,” simply because they exist as a member of our society. (Civil Docket No. 1, paragraphs 10 through 17; Article 1, Section 9, clause 4, U.S. Constitution) [FN-2]

Nor can “liability” for the excise tax upon “commercial net income,” imposed under Subtitle A of the Tax Code (Chapter 1 of the 1939 IRC), be implied through an irrebuttable statutory presumption created by erroneously filing a W-4 Certificate under the mandatory requirements contained in chapter 24 of Subtitle C. (Civil Docket No. 1, paragraphs 17 through 20; Civil Docket No. 13; Civil Docket no. 20; Article 1, Section 8, U.S. Constitution). [FN-3]

The two subtitles are unrelated as far as the imposition of the “liability” for the “excise” tax is concerned. The “withholding” provisions found in chapter 24 of Subtitle C merely provide a method for collecting the excise

tax upon “commercial net-income” imposed under Subtitle A; those provisions do not impose a separate “withholding tax” on wages. (Civil Docket No. 1, Paragraphs 12, 13, 16). [FN 4]

The Statutory provisions of Title 26 must be read as a whole, not as disconnected or separate statements which lead to confusion or defeat the intent of the Statute; or the Constitution. (Civil Docket No. 1, paragraph 21) [FN 5]

Our allegations deal with statutory “classifications” and the resulting “substance” of the excise imposed, in error (honest mistake), upon our annual receipts (whole income). There must be a line drawn separating a valid excise upon “income (meaning the gain derived from),” from that of a direct, or capitaion, tax being placed upon people; for no one can survive without some form of income (meaning all that comes in) to support themselves with. Congress selected the classifications of “business” and “commercial net-income” to be the basis of the Federal Income Tax; not labor, gross income, or annual receipts. (Civil Docket No. 1, paragraph 16; Civil Docket No. 20, Exhibit A, footnotes 1, 2, and 3) [FN 6]

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The Supreme Court in Lukhard v. Reed, 481 US 368, 374-376, recognized that, in common speech, there existed two distinct definitions for the word “income”. The first definition they related to the federal income tax system, meaning “the gain, profit, or income derived from,” i.e., increases in wealth, while the second was applicable to the welfare system, meaning “all that comes in”. The two are distinctly different, in that the former is most generally “derived from” the latter. The Tax Code no longer provides a definition for the word “income”; leaving the question, as to the proper application under Title 26, open to arbitrary interpretation. (Civil Docket No. 1, paragraphs 13, 16, 17, 22 and 24) [FN 7]

The tax imposed upon the former has always been deemed to be an excise upon the privilege of producing or receiving “gain or profit” from the employment or use of “capital, labor or both combined,” i.e., business, financial, and commercial activities. Whereas, a tax upon the latter is considered to be a direct tax requiring apportionment according to the Pollock decision (Civil Docket No. 1, paragraph 17 and 21). [FN 8]

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The two definitions of “income” are not the same. The law cannot impose upon two separate members of the same “classification” a single tax using two completely different definitions of the subject, without violating the due process clause. Nor can Congress “classify” everyone who labors for a living as being “in business,” simply for the purpose of laying an excise upon his or her “income”. The excise imposed upon the sole proprietor (individual) is levied upon the privilege of receiving “gain” from the employment or use of “capital, labor, or both combined,” i.e., business and financial activities. The amount of “tax” is then measured by the amount of “commercial net income” derived from those receipts (Schedule C, Line 22 of the 1040 Tax Return). Whereas, the tax imposed upon the common “labor for hire” employee ends up being an excise imposed upon their property “labor,” measured by the amount of their annual receipts (Line 7, therefore, Line 22 of the 1040 Tax Return). (Civil Docket No. 1, paragraph 21 and 22; Civil Docket 23, II B 1) [FN 9]

A tax imposed upon the “gain or profit (income) derived from” the receipts produced by property (capital and or labor), is in substance an

indirect tax upon the use of (or privilege of using) that property. Whereas a tax imposed entirely upon the receipts (whole income) produced by property (Line 7 and therefore Line 22 of the 1040 Tax Return) could very well be a direct tax upon that property. It is the substance of the tax, not its form or name, that must control. (Civil Docket No. 1, paragraph 24) [FN 10]

The federal income tax is imposed upon "commercial net income," not receipts or even gross income. It is a business excise tax, not a capitation tax. "Compensation for services" is a term of art having two interrelated meanings. First, representing the receipts produced by offering personal services as a business enterprise and second, as the "compensation" taken out of those receipts by the taxpayer for those services. The former is that from which the latter is derived; thereby making the actual pay received a portion of the commercial net-income (gain) derived from the operation of the business or commercial activity, in compliance with the wording of the 16th Amendment. Unless the common laborer is, in fact, in business, their "wages" represent annual receipts, not commercial net-income (line 22 of the 1040 tax return). (Civil Docket No. 1, paragraph 13, and Exhibit A; Civil Docket No. 13) [FN 11]

This principle was recognized by the Supreme Court in 1895 when the question of what constituted a "direct tax," under the Constitution, was raised. Their answer has never been challenged or overruled, it is as valid today as it was in 1787 when the Constitution was written. In fact, the Sixteenth Amendment was specifically drafted to preserve that answer (Legislative history of SJR-40 (1909): Civil Docket No. 20, Exhibit A).

> "*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*". (Pollock v. Farmers, 158 US 601, 625)

Subtitle C, on the other hand, relates to "employment taxes" imposed upon the privilege of being employed and or, having the ability to employ others. Those provisions are imposed upon persons (individuals) "through or by means of which any business, financial transaction, or venture is carried on" (26 CFR 31.0-2 (a) (8)). Therefore, the provisions of Subtitle C (26 USC

Chapters 21-25) have no application to the common law “labor for hire” employee providing only labor (Civil Docket No. 20), which does not fall within the specified “classifications” of the excise being imposed. That is, there is no “statutory” provision requiring the common law “labor for hire” employee to file a W-4, unless they have other “taxable” sources of “income” to report. (Civil Docket No. 13; Civil Docket No. 20, Exhibit A, Attachment A) [FN 12]

Congress recognized this distinction by defining wages under Subtitle C as “remuneration for services,” ***if*** paid as “compensation for services” (26CFR31.3401(a)-1(a) (2) versus 26USC61 (a) (1)); instead of defining “compensation for services” under Subtitle A as including “wages”. By doing so, Congress specifically recognized that not all “wages” were “includible in gross income” under the fundamental law or the statute (Civil Docket No. 1, Exhibit A; Civil Docket No. 13) [FN 13]

Congress specifically addressed the possibility that a large number of people would make the “honest mistake” of believing they were made liable for the excise tax imposed upon income, when, in fact, the statutory

provisions imposing the excise upon “commercial activities and privileges” did not apply to them.

Our County paychecks are our only form of income (all that comes in), they are, in fact, our “whole income,’ the total annual receipts produced by our “whole property” (labor) both real and personal. A tax placed directly upon those “wages” as annual receipts (Line 7, therefore, Line 22 of the 1040 Tax Return) is, by definition, a “capitation, or other direct, tax” requiring apportionment under Article 1, Section 9, clause 4 of the U. S. Constitution. Taking this to its ultimate conclusion, “the power to tax is the power to destroy”, for if Congress has the power to levy an excise tax of 1% of our wages (line 22 of the 1040 Tax Return) they inherently have the concurrent power to take 100% of those wages. (Civil Docket No. 1, paragraph 20, 23 and 24) [FN 14]

Our belief is that Congress specifically recognized the possibility of confusing the two definitions of “income” when they provided for “honest mistakes” under the “Current Tax Payment Act of 1943”. They again recognized that possibility when they changed the W-4 Withholding Certificate in 1969 by adding subsection (n) to section 3402. [FN 15]

We believe that the Legislative history of Title 26, the Treasury Regulations implemented thereunder, and court cases interpreting the application of the law support our position. We have voiced these concerns in our request for refund and have presented documentation from the Congressional Record; Committee Reports; the various Statutes; the Treasury Regulations; court cases; and other government produced materials to the Treasury Department; the Internal Revenue Service; the Department of Justice and to the Court. To date no one has answered our questions or refuted our interpretation of the Statute. We are therefore asking the Ninth Circuit Court of Appeals to review the legislative history of Title 26 as a whole, as well as the implementing Treasury Regulations, for compliance with Congressional intent and Constitutional restrictions. [FN 16]

Case number 05-55954 Footnotes

[FN-1] CRS Report for Congress, 92-303A, March 13, 1992, Question 3 "What does the court mean when it states that the income tax is in the nature of an excise tax?"

"An excise tax is a tax levied on the manufacture, sale, or consumption of a commodity or any of various taxes on privileges often assessed in the form of a license or fee. In other words, it is a tax on doing something to property or on the privilege of holding some property or doing some act, not a tax on the property itself. A sales tax is a clear example of an excise tax. The tax is not on the property directly, but rather it is a tax on the transaction.

When a court refers to an income tax as being in the nature of an excise, it is merely stating that the tax is not on the property itself, but rather it is a fee for the privilege of receiving gain from property. The tax is based upon the amount of gain, not on the value of the property."

Note the wording used by Chief Justice White in Brushaber v. Union Pacific, 240 U.S. 1, 17: "but, on the contrary, recognized that taxation on income was in its nature an excise". There is a profound difference between something that is "in the nature of" something else, and being "in its nature" that very thing.

A "capitation, or other direct, tax," on the other hand, is defined to be:

"a tax 'upon the person simply without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow." (Gardner v. Hall, 61 N.C. 21, cited in Pollock v. Farmers, 157 U.S. 427)

http://waysandmeans.house.gov/legacy/fullcomm/107cong/2-13-01/record/given.htm

[FN-2] Noland v. Commissioner, 269 F2d 108, 111 [2-3] (1959): "We start with the assumption that every person who works for compensation is engaged in the business of earning his pay,"

United States v. Gilmore, 372 U.S. 39, 44 (1963): "For income tax purposes Congress has seen fit to regard an individual as having two personalities: "one is [as] a seeker after profit who can deduct the expenses incurred in that search; the other is [as] a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures." 11

Chapman v. Commissioner, 14 TC 943 (1950): "The tax shown opposite a taxpayer's "adjusted gross income" in the tax table contained in section 400 of Supplement T of the Internal Revenue Code is a tax computed on the taxpayer's "net

income" arrived at by allowing deductions substantially equal to 10 per cent of the taxpayer's gross income, his personal exemption, and credits for dependents."

Supplement T provided an alternative method (in lieu) for computing the tax imposed upon "commercial net income, (Regulation 118, 39.1-1 and 39.21-1 (1951))" Supplement T did not impose an excise tax upon "gross income". The "Supplement T" provisions included a reduction of 10 per cent of the amount of tax "in lieu" of proving actual expenses in computing commercial net income, plus the personal exemption amount. Congress cannot "allow" a deduction from something they do not have the authority under the Statute to tax, in order to make it taxable.

> South Carolina v. Baker, 485 U.S. 505, 516 (1988): "The United States cannot convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by direct regulation is irrelevant; Congress cannot employ unconstitutional means to reach a constitutional end."

[FN-3] Vlandis v. Kline, 412 U.S. 441, 446 (1973): "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."

Heiner v. Donnan, 285 U.S. 312, 329 (1932): 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

Schlesinger v. State of Wisconsin, 270 U.S. 230, 240 (1926): "A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

Treasury Regulation 115, Federal Register of September 7, 1943 (pages 12262-12285). See Subsection 404.106 (a) on p. 12268 and (e) on p. 12269; definition of "person" under section 3797 (a) and (b) of the Statute. Compare that definition to Subsection 404.107 (c), p. 12269, the definition of "person" under Subchapter D Employment Taxes. The term "person," in both definitions, identifies those "through and by means of which any business, financial operation, or venture is carried on," including "individuals" who are "employees" (subsection 404.104, p. 12267) of another "person" (subsection 404.105, p. 12268).

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Section 1622 (h) Withholding Exemption Certificates (p. 12276); "Employees ***shall*** furnish the employer with a signed withholding certificate, on Form W-4, ".

Section 1622 (h) created an irrebuttable statutory presumption that all employees are "individuals" under the classification of "person," therefore, subject to the excise tax imposed upon commercial net income by Chapter 1. This not only meant that common law labor for hire was in itself a "business," but that the "wages" exchanged for that labor constituted "commercial net income," not gross receipts.

[FN-4] Baral v. United States, No. 98-1667 DC Circuit, (2000): "Contrary to Baral's claim, the withholding tax and estimated tax are not taxes in their own right (separate from the income tax), that are converted into income tax only on the income tax return. Rather, they are methods for collecting income taxes."

Central Illinois Public Service Co. v. United States, 435 U.S. 21, 24 (1978): "The income tax issue is not before us in this case. … These withholding [435 U.S. 21, 25] statutes are in Subtitle C of the Code. The income tax provisions constitute Subtitle A."

[FN 5] Kelly v. Robinson, 479 U.S. 36, 43 (1986): "The Court of Appeals' decision focused primarily on the language of 101 and 523 of the Code. Of course, the "starting point in every case involving construction of a statute is the language itself." (…) But the text is only the starting point. As Justice O'Conner explained last Term: " "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." "

United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940): "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, (22) however clear the words may appear on 'superficial examination.' (23)"

[FN 6] Louisville Gas & Electric Co., v. Coleman, 277 U.S. 32, 41 (1928) Dissenting opinion of Justice Holmes: "When a legal distinction is determined, as no one doubts that it must be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary."

Commissioner v. Tellier, 383 U.S. 687, 691 (1966): "We start with the proposition that the federal income tax is a tax upon net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning." (See Footnote 11)

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The Legislative history of the 16th Amendment, as well as that of the Revenue Act of 1913, provide the basis of our current income tax system (Tellier, supra).
A tax upon "commercial net-income," can only be sustained upon those falling within the classification selected by Congress. That "classification" is defined as: "through and by means of which any business, financial operation or venture is carried on", as such, it cannot be extended to subjects or subject matter outside that boundary without raising Due Process issues. (Eisner v. Macomber, 252 U.S. 189, 205, 206 (1919))

[FN 7] Lukhard v. Reed, 481 U.S. 368, 375-375 (1987): "And since both general and legal sources define "income" as involving gain, see e.g., Webster's Third New International Dictionary 1143 (1976) ("a gain or recurrent benefit that is usu. measured in money …"); 42 C. J. S., Income, p. 531 (1944) ("In common speech 'income' generally is understood as gain or profit …" (footnote omitted); Eisner v. Macomber, 252 U.S. 189, 207 (1920) ("Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets …" (quoting Stratton's Independence, Ltd. V. Howbert, 231 U.S. 399, 415 (1913); Doyle v. Mitchell Brothers Co., 247 U.S. 179, 185 (1918)). … More importantly, however, as Lukhard and the Secretary point out, general and legal sources also commonly define "income" to mean "any money that comes in," without regard to any related expenses incurred and without any requirement that the transaction producing the money result in a net gain. See, e.g., 5 Oxford English Dictionary 162 (1933) (That which comes in…(considered in reference to its amount, and commonly expressed in money); … receipts…"); 42 C.J.S., Income, p. 529 (1944) ("Generally or ordinarily the term means all that comes in; … something which is paid over and delivered to the recipient; … without reference to the outgoing expenditures …" (footnotes omitted))

Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961): "We look first to the face of the statute. "Discovery" is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. These words strongly suggest that a precise and narrow application was intended in 456. The three words in conjunction, "exploration," "discovery," and "prospecting," all describe income-producing activity in the oil and gas and mining industries, but it is difficult to conceive of any other industry to which they all apply. Certainly the development and manufacture of drugs and cameras are not such industries. The maxim noscitur a sociis, that a word is know by the company it keeps, while not an

inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."

K Mart Corp. Cartier, Inc., 486 U.S. 218 (1988): The ambiguous meaning of words.

What does the statutory phrase in Section 61 (a) "gross income means all income from whatever source derived" really mean, in a statute imposing an excise upon commercial activities and privileges measured by the "gain" derived from them? Is the excise tax levied upon the receipts, or the gain (profit) derived from those receipts? Whatever that answer is, it must be consistent for every member of the classification it is imposed upon.

Blodgett v. Holden, 275 U.S. 142, 147 (1928): "In Nichols v. Coolidge (May 31, 1926) this Court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment."

[FN 8] Brushaber v. Union Pacific, 240 U.S. 1, 16 (1915): "It was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution."

"Taxing the Exercise of Natural Rights" J.M. Maguire (1934) Harvard Legal Essays. This essay is cited by the Supreme Court in Steward Machine Co. v. Davis, 301 U.S. 548, 580 (note 6) as the basis for upholding the excise tax placed upon employers engaged in the employment of eight or more employees. This case does not deal with the question of whether or not a common law labor for hire employee is "in business" nor does it purport to establish such. In fact, the cases cited therein would seem to prove just the opposite.

Regulations 45, House Document 1826, 65th Congress, 3d Session, Congressional Serial Set 7477 (1919). Article 1. Income Tax on Individuals. "The tax is upon net income, as defined in the statute, after deducting from gross income, as defined in the statute, the allowable deductions." Article 21. "Though taxable net income is wholly a statutory conception it follows, subject to certain modifications 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. What excluded from gross income. "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.

Regulations 103, Income Tax Under the Internal Revenue Code (1939) (Federal Register of February 1, 1940, p. 348 and following). Subsection 19.1-1 Scope of Regulations. "These regulations deal with the taxes upon net income imposed by chapter 1. Subsection 19.21-1 Meaning of net income. "The tax imposed by chapter 1 is upon income. Neither income exempted by statute or fundamental law, nor expenses incurred in connection therewith, other than interest, enter into the computation of net income as defined by section 21." (d) "… Subject to these modifications statutory net income is commercial net income." Subsection 19.22 (b)-1 Exemptions—Exclusions from gross income. (1) "those items of income which are, under the Constitution not taxable by the Federal Government."

Regulations 111, Federal Register of November 3, 1943, pages 14882 and following. Same as Regulations 103, except numbers change to 29.1-1; 29.21-1 and 29. 22-1.

Regulations 118 (1951), U.S. Code and Congressional Administrative News, 1956 Edition. Same wording as Regulations 103 and 111, except numbers changed to begin with 39..

[FN 9] Oregon Short Line Railroad v. Dept. of Revenue, 97-35025 [10] (9th Cir.): "While the area of taxation might not immediately leap to mind when one thinks of equal protection problems, there can be little doubt that discriminatory state taxation can implicate equal protection concerns. States do have broad authority to classify those whom they intend to tax and to impose different tax burdens on different classes. (citation omitted) Nevertheless, the Supreme Court has not hesitated to strike down taxation schemes which do not rest "upon some reasonable consideration of difference or policy…"

Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 165 (1897): "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

[FN 10] Fairbank v. U.S., 181 U.S. 283, 296 (1901): "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitation of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional

provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has been established by repeated decisions of this court."

Educational Films Corp. v. Ward, 282 U.S. 379, 391 (1931): "It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of governmental instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence, unless the taxpayer enjoys a privilege which is the proper object of taxation, and which would not be open to question if its amount were arrived at by any other nondiscriminatory method."

United States v. Wells Fargo Bank, 485 U.S. 351, 355 (1988): "the property was exempt from direct taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed. Underlying this doctrine is the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property's value, and a tax levied upon the property itself. The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden."

[FN 11] Pedone v. United States, 151 F. Supp. 288, 291 (1957): "It was not the intent of the 16th Amendment to authorize the Federal Government to lay an income tax upon everything of value that came into the ownership of the potential taxpayer. The common understanding of the word income is the amount which one has gained by his transaction or activity. His gains, not his gross receipts, are his constitutionally taxable income."

Commissioner of Internal Revenue v. Weisman, 197 F.2d 221, 224 (1952): "We disagree with this contention for we believe there is a real distinction between offsets, such as the cost of goods under s22 and the deductions under s23. It is not a difference without substance and has more support for its existence than being merely an historical accident. The return of capital is guaranteed by the "cost of goods" offset against gross receipts and thus is avoided the charge that it is a tax on capital and not on income. As indicated above, the tax under consideration is not a tax on gross receipts."

Commissioner v. Sullivan, 356 U.S. 27, 29 (1958): "If we enforce as federal policy the rule espoused by the Commissioner in this case, we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If the choice is to be made, Congress should do it."

[FN 12] Crane v. Commissioner of Internal Revenue, 331 U.S. 1, 6 (1947): "The only relevant definition of 'property' to be found in the principal standard dictionaries 14 are the two favored by the Commissioner, i.e., either that 'property' is the physical thing which is a subject of ownership, or it is the aggregate of the owner's rights to control and dispose of that thing. 'Equity' is not given as a synonym, nor do either of the foregoing definitions suggest that it could be correctly so used."

Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 513 (1937): "Tax on Employees. Appellees extend their attack on the statute from the tax imposed on them as employers to the tax imposed upon employees. But they cannot object to a tax which they are not asked to pay, at least if it is separable, as we think it is, from the tax they must pay. The statute contains the usual separability clause. Section 19. The taxation of employees is not a prerequisite to enjoyment of the benefits of Social Security Act. The collection and expenditure of the tax on employers do not depend upon taxing the employees, and we find nothing in the language of the statute or its application to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of the separability clause.

[FN 13] H.R. 7378 Revenue Act of 1942, Conference Report 2586; Senate Report 1631; House Report 2333. Hearings before the Committee on Finance, H.R. 7378 (Revised) Volume 1 and 2, July 23 to August 14, 1942. Treasury Decision 5249, Victory Tax on Individuals, Federal Register of March 31, 1943, pages 3890-3906. Subsection 19.466-1 Requirements of withholding. (b) "Wages includible in gross income:

"Wages includible in gross income. Under the provisions of section 466, wages are subject to withholding only if and to the extent includible in gross income. The term "includible in gross income" as it relates to wages from which the tax is required to be deducted and withheld refers only to the taxability of the income. Thus, if an item of

wages constitutes gross income under the provisions of section 22, it is includible in gross income within the meaning of this section and is subject to withholding." [See also Regulation 111, section 29.466-1 (b); Federal Register of Nov. 5, 1943, page 15215]

H.R. 2570 Current Tax Payment Act of 1943, Conference Report 510, page 34; Senate Report 221, page 22; House Report 401, page 25:

"A clerical amendment in the House bill eliminated the provision in section 466 (a) which restrict the withholding to wages includible in gross income. The same change is made in the Senate bill. This limitation, which was designed to exclude from withholding the amount of any wage payment exempted under the law from the tax imposed by chapter 1 of the Code, is rendered unnecessary by the changes made in the definition of the term "wages". [See page 29 "Definitions": "The general definition of the term "wages" contained in section 1621 (a) is the same as that contained in the House

bill and in section 465 (a) of the Code. The term is generally defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer." [See also page 48, Rule where no tax liability.]

[FN 14] Fairbank *Supra* @ 290-291: "If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moments reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported."

Pittsburgh v. Alco Parking Corp., 417 U.S. 369, (1974): "(a) The fact that a tax is so excessive as to render a business unprofitable or even threaten its existence furnishes no ground for holding the tax unconstitutional."

Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987): "We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit."

United States v. Morris, 125 F 322, 331 (1903): "That the rights to lease lands and to accept employment as a laborer for hire are the fundamental rights, inherent in every free citizen, is indisputable;"

[FN 15] 83 Stat. Public Law 91-172-Dec. 30, 1969, page 707, section 805 (f)

[FN 16] Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 2 (1) (1976): "To the extent the Court of Appeals excluded reference to the FWPCA'S legislative history in discerning the meaning of the statute, the court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

K-Mart v. Cartier, Inc., 486 U.S. 281, 282 (1) (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."