IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GARY GIVEN, SR., and
MICHELE LOUISE GIVEN,

Plaintiffs-Appellants

No. 05-55954

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPELLANTS RESPONSE TO MOTION FOR SUMMARY AFFIRMANCE AND SUSPENSION OF THE BRIEFING SCHEDULE

Pursuant to Rule 27 (a) (3) of the Federal Rules of Appellate Procedures, John Gary Given, Sr., and Michele Louise Given, appellants in the above reference case, respond to the motion for summary affirmance and suspension of the briefing schedule. For the following reasons, appellants object to the granting of this motion.

Whereas Counsel for the United States has acknowledged our position (Motion, page 2-3), they have not refuted the allegations we presented in our brief (Brief, p. 2-3 & 9-17), nor have they offered any evidence to the court that those allegations are contrary to the wording of the statute. (M, p. 4-7)

Further, unless appellants have refused to file their tax returns or pay the amount of tax shown thereon, the cases cited by the counsel for the United States are off base and have no application to our argument. (M, p. 5-6)

The Supreme Court has recognized that there are two distinct legal definitions for the word "income" (Br, p.11; p. 21, fn. 7), only one of which is applicable to the federal income tax under the 16th Amendment. (Br, p. 18, fn. 1 and 2)

Contrary to what the counsel for the United States would like the court to believe; our claim is that our "wages" are, in fact, income. (M, p. 5) That is, those "wages" are the annual receipts, or whole income, received in exchange for our property (labor). (Br, p. 25, fn. 12) We made that statement on the 1040X Form by identifying "Wages not subject to income tax per Attachment A". (ER p. 35-43) We have not claimed that wages "are not income". Our contention is that our wages do not constitute "commercial net income" in compliance with the classification of "income" selected by Congress. (M, p. 5) The Supreme Court made the distinction between the two forms of "income" when they defined that term under the 16th Amendment to mean "the gain derived from," not the receipts produced by "capital, labor, or both combined". Congress took that definition one step further by specifically identifying "commercial net income" as the basis of

the excise imposed by statute. Congress did not change that basis when they revised the Tax Code in 1954. (Doc. 1, p. 5 #22; Br, p. 22, fn. 8; ER p. 25, fn. 25)

We believe that the "wages" (whole income) received by the common law, labor for hire (not in business), employee, having no other source of "income (gains and profits)," are exempt from Subtitle A income taxes by operation of the Constitution, as well as the statute. (Br, p. 4-6) Those "wages" are not paid out of (derived from) other receipts, but are in fact the whole income received in exchange for property. It appears to us that to hold such receipts taxable would defeat the Constitutional safeguards of Article 1, Section 9, clause 4, as well as ignore the Supreme Court decisions rendered in several cases; for examples (Br, p. 14; p. 19 fn. 3; p. 20 fn. 6):

"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 U.S. @ 625)

"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." (Heiner v. Donnan, 285 U.S. 312, 329)

And

"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." (Commissioner v. Tellier, 383 U.S.687, 691 (1966))

The federal income tax is a tax upon "commercial net income," not "wages"; unless such wages fall within the definition of commercial net income. (Br, p. 15; p. 22-23, fn. 8) The imposition is an "excise," "impost," or "duty," not a "capitation, or other direct, tax". The purpose for reviewing the legislative history of the Statute as a whole is to prevent confusion as to the intent of Congress. (Doc. 1, p. 5 #21; Br, p. 7-8,16-17)

Counsel for the United States refers to appellants as "taxpayers," in essence, because money has been withdrawn from our paychecks and deposited with the government under the guise of being a "tax".

The statutory definition of "Taxpayer" is: "one who is subject to any internal revenue tax". The term "subject to" indicates "liability" for the excise being imposed, it has nothing to do with the payment to, or receipt of money, by the federal government. (Br, p. 20, fn. 4)

We are refuting the presumption that our labor falls within the "classification," of persons identified in 26CFR301.7701-1, 2, 3, or 6 and

26CFR31.02(a)(8). (Doc. 1, p. 4 #17; Br, p. 4-5, 10, 13-16; M, p. 2) The wording of the definition provided by statute is "through or by means of which any business, financial operation, or venture is carried on," i.e., commercial activity, not simply the performance of "labor". (Br, p. 18, fn.1) We do not render "personal services," as that term is used in the Tax Code. We provide the labor through which our employer provides "services" to the public. (Br, p. 26, fn. 14) Nor do we receive "commercial net income," i.e., compensation for services, in exchange for our labor. Our pay is our whole income, i.e., the total annual payments received for our property (labor). (Br, p. 3, 13, 15)

The money withheld from our paychecks is not a "tax," it is simply money set aside in anticipation of the "liability" for the excise. Counsel for the United States has not refuted our position on these issues, nor have they offered the court any evidence suggesting that our position is contrary to the Constitution or the legislative intent of the statute.

Our contention is that the mandatory filing of the W-4 Certificate and the withholding of money from the common law, labor for hire employee's paycheck in 1942, created an irrebuttable presumption of liability (Doc. 1, p. 4; Br, p. 5-6) for the excise imposed upon "commercial net income" by the 1939 Internal Revenue Code (Br, p. 22 fn. 8). That presumption of liability

for the excise has never been challenged by the common law, labor for hire (not in business) employee (Br. P. 25, fn. 12); at least not so far as we have been able to determine from the court cases cited by counsel for the United States.

The Ninth Circuit, in *Oregon Short Line RR v. Department of Revenue, 97-35025* recognized the possibility that in the area of taxation equal protection concerns might exist. That "classifications" are made and that those classifications must be "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not mere arbitrary selection." (Citing Gulf, C.& S. F. R Co. v. Ellis, 165 U.S. 150, 165)

The "classifications" selected by Congress are business, financial operations, or ventures and commercial net income. Congress did not include the terms "people," or money. Congress cannot arbitrarily "classify" everyone who labors as being "in business," simply for the purpose of laying an excise upon their activities. Nor can Congress arbitrarily convert the employee's wages (whole income) into adjusted gross income (commercial net income), in order to levy a tax upon them. (ER 35-43; Br, p. 4; p. 18, fn. 2)

We believe Congress specifically provided a statutory escape from this presumption in 1943 (Br, p. 7-8; p. 25, fn. 13; M, p. 4-5). They again recognized this conflict through The Tax Reform Act of 1969, when they added subsection (n) to Title 26, section 3402 (Employees incurring no income tax liability) (ER p. 18).

CONCLUSION

The Supreme Court has held on countless occasions that "the power to tax, is the power to destroy," that is, once the power to levy the tax is confirmed, the court is powerless to control the force at which it is imposed. (ER p. 6, #23; Br, p. 26, fn. 14) If Congress has the Constitutional power to take 1% of the common law, labor for hire (not in business) employee's whole income (wages), they must also have the power to take 100% of that income, for the Constitution places no restraint upon them. (ER p. 6)

We believe that the Statute is written correctly, that it does provide for the exemption of "wages," earned by the common law, labor for hire (not in business) employee, as their annual receipts (whole income), from the operation of both Subtitle A and C in compliance with the Constitution.

So long as the interpretation of the statute is confined to the "classifications" selected by Congress, the tax operates upon all within that classification with equal force. It is the intent of the provisions found in section 151 of the Tax Code, that provides the equality between those upon whom the excise operates and those who are exempted from those provision by the operation of the fundamental law. (Br, p. 2-3, p. 22, fn. 8, p. 25, fn. 12)

We are therefore asking the Court to deny the motion for summary affirmance and compel the counsel for the United States to immediately* file their answering brief.

*FRAP 27.11 allows for automatic stay of the schedule for certain specified motions. Appellee's motion does not fall within the enumerated exceptions.

*FRAP 31.2.2 (b) request for extension of time must be filed 7 calendar days prior to the due date of the brief. Appellee's motion was filed 5 days prior.

Respectfully submitted

John Gary Given Sr. November 10, 2005

Michele Louise Given November 10, 2005

PROOF OF SERVICE

Ninth Circuit Court of Appeals

CASE NO. 05-55954

I certify that a copy of our Response to the Appellee's Motion for Summary Affirmance and Suspension of the Briefing Schedule was served, by U.S. mail, on the persons listed below.

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