John Gary Given, Michele Louise Given
[redacted]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

John Gary Given, Michele Louise Given PLAINTIFF -V- United States of America DEFENDANT ----------	ED CV 04-00075 RT (MCx) Statement of Genuine Issues of Material Fact by Opposing Party, pursuant to Local Rule F.R. Civ. P.56 –2

The plaintiffs John Gary Given and Michele Louise Given enter into the record the following “Statement of Genuine Issues” and Exhibit A, in opposition to the Motion for Summary Judgement.

STATEMENT OF GENUINE ISSUES

1) Plaintiffs request for determination of status, Part A of Attachment A, has never been answered. Therefore, plaintiffs assert they are not individuals "through and by means of which any business, financial operation, or venture is carried on," in compliance with the classification selected by Congress. [26 U.S.C. 7701 (a) (1), 26 C.F.R. 301.7701-1, -2, and –3]

2) Plaintiff's "wages" are their only form of income, representing their entire annual receipts or "whole income" produced by their labor; as such, plaintiff's "wages" do not fall within the subject matter of the excise tax imposed by Congress upon commercial net income. [Legislative history of 26 U.S.C. 1; 26 U.S.C. 3; 26 U.S.C. 61; 26 U.S.C. 62; 26 U.S.C. 63; and 26 U.S.C. 3401; Commissioner v Tellier, 383 U.S. 687, 691 (1966)]

3) Plaintiff's request for a Ruling or Determination Letter, Part B of Attachment A, has never been answered. Therefore, plaintiffs assert they are not individuals "through or by means of which any business, financial operation, or venture is carried on" in compliance with the classification selected by Congress. [26 C.F.R. 31.0-2 (a) (8); 26 C.F.R. 3401 (c)-1 (a)]

4) Plaintiffs assert that their "wages," as annual receipts, fall within the specific exemption of 26 C.F.R. 31.3401 (a) –2 (a) and are therefore not subject to withholding. [Legislative history of Subtitle C, Chapter 24—Collection of income tax at source on wages; Baral v. United States, No. 98-1667, February 22, 2000, District of Columbia Circuit]

5) Plaintiffs assert that their “wages,” as annual receipts, fall squarely within the provisions of 26 U.S.C. 6401 © and 26 C.F.R 301-6401-1 (b). [Legislative history of 26CFR3402 (n)]

6) Plaintiffs assert that the tax, supposedly imposed upon their whole income, falls within the provisions of 26 C.F.R. 601. 106 (f); 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.”

7) Plaintiffs assert that the frivolous penalty assessed by the IRS under 26 U. S. C. 6702 (a) is improper. Plaintiff’s returns were properly filed and never questioned as to correctness ((1) (A) and (B)); or used to delay or impede the administration of the law ((2) (A) and (B)). Both conditions must be met before any penalty can be assessed.

Respectfully submitted,

May 09, 2005

John Gary Given

Plaintiff, pro per

May 09, 2005

Michele Louise Given
Plaintiff, pro per

EXHIBIT A

The United States Constitution, by itself, does not impose a Tax upon anyone, its sole purpose is to enumerate the powers and authorities granted to Congress by the people. It is up to Congress, through legislation, to impose the burdens of taxation. As such, Congress has the responsibility to decide if, when, and to what extent that power is to be exerted upon the people. They may choose to exert the full power; a portion of that power; or not to enforce that power at all. Congress, through the ratification of the Sixteenth Amendment and the implementation of the 1913 Revenue Act chose to limit that power, conforming it instead, through the wording of the Statute, to the requirements of the existing Constitutional provisions of Article 1, Section 8. [Footnote 1]

Article 1, Section 8, clause 1: The general power and authority to levy and collect Taxes, provided that all excise, impost, and duty Taxes be enforced uniformly throughout the United States.

Article 1, Section 9, clause 4: Provides the requirement that all "capitation, or other direct, Taxes" be apportioned to the States upon the basis of population.

Pollock v. Farmers Loan and Trust,157 U.S. 427 and 158 U.S. 601.

The Supreme Court, after an exhaustive research and discussion of the formation of this country and the intent of the framers of the Constitution, in relation to the imposition of Taxes, defined the term "direct", under Article 1, Section 9, clause 4, in accordance with Hamilton's views on the subject:

"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." [158 U.S. 601, 625]

Our labor is our only income producing property and a tax upon the annual receipts, i.e., the gross "wages" produced by that property is a tax upon our "whole income"; and is, therefore, a direct tax within the meaning of the U.S. Constitution.

The Sixteenth Amendment was a direct result of the decision rendered in the Pollock Cases. The proposed amendments and Congressional debates over them must be deemed to control its meaning.

SJR-39, Congressional Record of June 17, 1909, page 3377: "The Congress shall have power to lay and collect direct taxes on incomes without

apportionment among the several States according to population." (Debated and rejected on July 5, 1909, pages 4109 to 4120)

SJR-40, Congressional Record of June 28, 1909, page 3900: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration." (Adopted on July 12, 1909, and ratified by the States)

The Revenue Act of 1913, Statutes at Large, Sixty-third Congress, Session 1, Chapter 16. There are at minimum two significant points upon which plaintiffs rely. First; the statements made by Congressman "Judge" Hull detailing the reasoning behind the statutory provisions and Treasury Regulation 33. And second; Senator Sterling's and Senator Chilton's remarks, recorded August 28, 1913, on pages 3844-45 explaining the "intent" of the statutory language and the meaning of "net income" in relation to the Law. [Footnote 2-3]

Brushaber v. Union Pacific Railroad, 240 U.S. 1, 16-17 (1915). This decision confirmed that the statutory "intent" expressed by Congress was to confine the Federal income tax to that of an excise Tax.

Treasury Regulation 45, Amended April 17, 1919, House Document 1826, Sixty-fifth Congress, 3d Session, Congressional Serial Set, Book 7477 and the Revenue Act of 1918, Statutes at Large, Volume 40, Part 1, 65th Congress, 3d Session, Chapter 18, Articles 21, 71, 291, 301, and 1501. [Footnote 4]

Billings v. People of 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. … Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute a class. But their classification indeed, all classification, must primarily depend upon purpose-the problem presented. Science will have one purpose, business another, and legislation still another." [Footnote 5]

The Federal Income Tax of 1918 was clearly an excise tax, imposed upon the privilege of receiving gain (profit) from the employment and use of capital, labor, or both combined. The term "individual" was used to separate single owner business, professional, and financial entities from those of multi-owner and corporate structured entities, in compliance with the requirements of uniformity in the application of the various statutory provisions. The term "individual" is used as a "words of art," having a legislatively defined meaning throughout the Revenue Acts.

The term "income" was limited, by statutory "intent," to that of "commercial net income," i.e., "gains, profits, and income derived from" the various uses of capital and or labor (sources). As such, the Statute had no application to the

common law-labor for hire- employee having no other “source” of income than the “wages” produced by their own labor.

The Revenue Acts of Congress are to be viewed as being in pari materia, unless and until Congress makes a clear departure from the original “intent” for which the provision was imposed. It is this supposed departure from the original “intent” that plaintiffs are questioning. [Footnote 6]

The Supreme Court in Commissioner v. Tellier, 383 U.S. 687, 691, 695 footnote 11 (1966), made this observation a formal part of their opinion:

“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 statute from the beginning.”

Taxes levied upon commercial net income, by definition, are excise taxes levied upon the privilege of receiving gain (profit) from business and financial activities, they are not Taxes levied upon people as such (Thomas v. United States, 192 U.S. 363 (1904).

TAXING THE EXERCISE OF NATURAL RIGHTS, John MacAuthur Maguire, Harvard Legal Essays, 1934, pages 273-322, cited by the Supreme Court in Steward Machine Co. v. Davis, 301 U.S. 548, 580, footnote 6.

This essay was apparently written to lay out the Constitutional questions involved in the levy of occupation taxes and the restraint imposed upon the federal taxing power by operation of Article 1, Section 9, clause 4. Mr. Maguire, through an exhaustive list of State court cases, defines the boundary between the taxation of natural rights as opposed to the direct taxation of inalienable rights. This distinction, to us, is best explained by Mr. Maguire’s court citations found on pages 286 and 287. [Footnote 7]

Our contention is that Congress has never departed from the original statutory “intent” of the Law imposed under the 1913 to 1953 Revenue Acts. That is, Congress did not change the statutory basis of the federal income tax from that of commercial net income by revising the Statute in 1954. [Footnote 8]

Plaintiffs believe and intend to show, through the legislative history of the pertinent Code sections, that the power to tax “income” begins on line 22 of the 1040 Tax Return [Exhibit A of Complaint]. The “above the line” deductions (schedules) represent the accounting method used to establish the gross amount of commercial net income required to be shown on the tax return, as the subject matter of the excise. The expenses incurred in the “production, collection, management, conservation, or maintenance of property held for the production of income” are a matter of judicial interpretation, in order to assure the conformance to the statutory “intent” of Congress, as well as, with Constitutional principles.

The deduction of “personal, living and family expenses” is prohibited, because the excise is imposed upon the commercial activity, not the natural person performing the services. These expenses are allowed as a deduction from the subject matter of the excise in conformity with the requirements of Article 1, section 9, clause 4. [Footnote 9]

Therefore, Line 22 represents the “total amount” of commercial net income subject to the operation of Subtitle A, not the “total” amount of receipts (whole income) earned by the common laborer. Remove Section 62 from Title 26 and nothing changes as far as the determination of taxable net income is concerned. The same end result is accomplished through the provisions of section 63 of Title 26. The purpose of section 62 (Legislative history of section 22 (n) under the 1939 I.R.C.) was to close the loophole allowing “individuals” to escape taxation, by requiring that their salary, wages, or compensation for personal services be included in the gross net income of the taxpayer. Congress chose to tax commercial net income rather than implement the broader definition of gross income in order to avoid the contentions raised in the Pollack Cases.

A copy of pages 1-9 from our Attachment A, attached to the request for refund, is provided for reference.

FOOTNOTES

1) “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 its 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 this country, we have exercised all the power we have. If we desire to limit ourselves to net income, we can not define “net income”; we can not say what shall be included in income or what shall not be included in income.” [Congressional Record of August 28, 1913, page 3844]

2) The proposed law should be construed as similar laws have been construed by the courts with respect to the application of the tax, and that is that the income in question shall be the measure of the tax and not the specific fund out of which the tax is necessarily payable: the bill takes as the measure of the tax the net income of the preceding year. Paragraph B defines the net income of a taxable individual or person. Income thus defined does not embrace capital or principle, but only such gains or profits as may be realized from rent, interest, salaries, trade, commerce, or sales of any kind or property, and so forth, or profits or gains derived from any other source.” [Congressional Record of April 26, 1913, page 506]

3) Mr. Sterling: If in the definition of the word “income” as given in a standard dictionary the words “gains and profits” are also given as synonymous with the term “income” would there be anything wrong in the use of those words in the section to which the Senator refers?
Mr. Chilton: Well, so far as the Senator goes. Let me offer this suggestion: on page 167, beginning in line 3, it is provided that the ‘income derived from salaries, wages, “ and so forth, shall be included. It has to be income before it can be taxed, no matter how it is derived. We could say that only income from salaries or income from property or income from interest, should be taxed. We have simply mentioned certain things: but they must be income before they can be taxed. We use the very language of the Constitution.” [Congressional Record of August 28, 1913, page 3845] See also; Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961) and the maxim “noscitur a sociis”.

4) Article 1501. Person.—The statute recognizes three chief classes of persons, to wit, individuals, partnerships, and corporations. Corporations include associations, joint-stock companies and insurance companies, but not

partnerships properly so called. A taxpayer is any person, trust or estate subject to tax."

5) See also Gulf, C. & S. F. R. Co., v. Ellis, 165 U.S. 150 (1897). Requirements of "classification".

6) "A Treatise on the Federal Income Tax Law of 1913", Thomas Gold Frost, Ph.D., Matthew Bender & Company 1913. Section 3, page 2, Construction of the Federal Income Tax Act of 1913: "In constructing 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 as in *pari materia* (U.S. v. Smith, 1 Saw. 277)

7) "If the Legislature were to attempt, by taxing all occupations, practically, to annul the prohibition against a poll tax, the question made might arise. But there is a clear distinction between a tax upon certain specified businesses, where the skill of the operator is a source of profit, or where the public are appealed to for patronage and protection of a fixed and regular business, and a tax covering all persons, whatever may be their occupation. … [The opinion then refers to taxes on lawyers, doctors, etc. and continues:] The skill, or education, or tact, which is the source of profit in these occupations, is clearly distinguishable from that capacity which is in every man to work for his support with the hands which God has given him." [Page 286]

8) H.R. 8300. Public Law 591-Chapter 736 Approved August 16, 1954. Committee on Ways and Means, Report No. 1337, Congressional Serial Set 11746. Detailed Discussions of the Technical Provisions of the Bill, pages A 18-A 20, Subchapter B—Computation of Taxable Income, sections 61, 62, and 63. See also the Senate Report No. 1635, Congressional Serial Set 11735, pages 168 to 170.

9) "Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022 (3) (B) of the Internal Revenue Code of 1986", [JCS-3-01] Volume II, page 30, Number 6: Above the line deductions and itemized deductions. See also our response letter contained in the full report, copy accessible on the House web-site at:
waysandmeans.house.gov/legacy/ fullcomm/107cong/2-13-01/record/given.htm