

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants

CASE NUMBER

No. 05-55954

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPELLANT'S PETITION FOR REHEARING EN BANC

Pursuant to Circuit Rule 35 (b) (1) (A) and (B) of the Federal Rules of Appellate Procedures, John Gary Given, Sr., and Michele Louise Given, appellants in the above reference case, petition the Ninth Circuit Court of Appeals for a rehearing en banc. We have followed the rules of law to the best of our ability and have continued to pay the tax in question. We come before the Court of Appeals with clean hands asking the Court for justice in resolving our concerns.

For the following reasons appellants strongly believe that an en banc rehearing is necessary to resolve conflicts between certain cases decided by the United States Supreme Court, and the application of those decisions by the District Courts and Courts of Appeals to the construction of the statute.

The statutory, as well as, Constitutional principles involved in those decisions formulate the distinction between an income tax that is direct under Article 1, Section 9, clause 4 of the United States Constitution and one that is an indirect excise under Article 8, clause 1 of that same Constitution.

It is our belief that the District Court erred in awarding Summary Judgement to the United States without any discussion or review of the legislative history, Congressional intent, or statutory construction involved with the evidence we presented.

“1. To the extent that the Court Of Appeals excluded reference to the FWPCA’S legislative history in determining the meaning of the statute, the court was in error, for “[w]hen aid to the 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’. United States v. American Trucking Assns, 310 U.S. 534, 543-544 Pp. 9-11. [Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 10 (1976)]

We believe the Appellate Court erred by not denying the request for Summary Affirmance and instructing the Department of Justice to file their answering brief. We raised the following issue in our original suit for refund.

“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.” [26CFR601.106 (f) (1) Rule 1]

The term “insubstantial,” as used in the Appellate Court’s Ruling in favor of Summary Affirmance, has a defined meaning as shown in *Hagans v. Lavine*, 415 U.S. 528 (1974):

“A claim is insubstantial only if “its unsoundness so clearly results from the previous decisions of the court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.”

To date neither the Treasury Department nor the Department of Justice has even suggested the existence of any case law dealing with our contentions, or argued that our interpretation of the statute is unfounded. The cases cited to and by the lower court were off base, **as those cases deal with a claim we did not make**, and would agree is totally wrong. Wages earned by labor are, in fact, “income” under the Oxford English Dictionary meaning of that term. However, the 16<sup>th</sup> Amendment’s legislative history, as well as the legislative history and judicial review of the Revenue Acts implemented from 1913 to present, made it clear that the Oxford definition was not the controlling one. That, in fact, the term “income” was to be defined under the requirements of an excise, in accordance with the American definition, and thus limited to that of “the gain derived from,” not the receipts produced by, capital, labor or both combined.”

“of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to

accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it." [Brushaber v. U.P. R.R., 240 U.S. 1, 17 (1915)]

## STATEMENT OF FACTS

The controversy is not whether or not wages are income, the conflict is whether or not those wages, as the annual receipts of property (labor), fall within the statutory definition of wages subject to the excise upon commercial net income imposed by Title 26, Subtitle A. The term "wages" does not appear in the wording of 26USC61(a) (1). Therefore, the question is raised as to the validity of the regulation using that term in defining "compensation for services" under Subtitle A. Congress defined "wages" under Subtitle C. The two Subtitles are not the same, nor does Subtitle C impose an "income tax" upon anyone [See, Baral v. United States, D.C. Circuit No. 98-1667. "We disagree. Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax."]. The Secretary of The Treasury, in writing the definition of "wages" under Subtitle C, conditioned the use of that term by stating "IF paid as 'compensation for services'. Subtitle C imposes excise taxes upon the privilege of having employees, it does not have any application to those

employees unless those employees fall within the specific definition

governing that Subtitle expressed in 26CFR31.0-2 (a) (8):

(8) Person includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation, or venture is carried on.”

We call the courts attention to *Jarecki v. G.D. Searle and Co.*, 367 U.S. 303, 307 (1961) and the maxim “*noscitur a sociis*”:

“The maxim *noscitur a sociis*, that a word is known 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.”

The statute, because it is an excise and not a direct tax, is not imposed directly upon people; however, it does apparently deal with the entities people choose to conduct business through; such as “physicians, lawyers, dentists, veterinarians, sole proprietor, independent contractor, corporations, partnerships, etc. “Individuals,” are, by statutory definition, single owner entities conducting business in all of its many forms, as opposed to multi-owner businesses such as corporations, associations, and partnerships.

My wife and I are not in business, nor do we own any business related property from which we receive any monetary value. Further, the statute, as an excise, deals with the term “income” in relation to those classes of

business, financial activities and transactions, it does not deal with the

Oxford Dictionary meaning of the term “income”.

“We start with the proposition that the federal income tax is a tax on 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), see also footnote 11]

The Supreme Court has said more than once:

“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.” [Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291-292 (1988)]

To date, we have not received any response to the questions we raised in our request for a “Ruling or Determination Letter” attached to and made part of our request for refund. The I.R.S., without comment or explanation as to the correct interpretation of cited statutory language and case history, arbitrarily denied our request for refund and held our request to be frivolous [Attachment A, pages 35-43, Excerpts of Record]. We filed our suit believing that would produce some discussion of these issues and answer our questions. We were wrong again, there has not been any discussion at all regarding our interpretation of the statute or our assertion that we do not fall within the specific “classification” of “person” and “income” defined by Congress in Subtitle A or C of the Internal Revenue Code. This lack of

discussion on the part of the Department of The Treasury and The Department of Justice, to us, raises substantial questions as to the application of statutory provisions, legislative intent, compliance with case law and the adherence to Constitutional regulations imposed upon taxation. We cite the 5<sup>th</sup> Circuit's conclusion in *United States v. Prudden*, 424 F.2d 1021, 1032 [7] (1970):

“Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.”

## DISCUSSION

The United States Supreme Court held that:

“It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with more limited meaning that might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute,” [*Boston Sand and Gravel co. v. United States*, 278 U.S. 41, 48 (1928);

The definition of “direct” was established by the Supreme Court in 1895 [*Brushaber, supra @ 16*]:

“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.” [Citing the views of Hamilton, *Pollock v. Farmers*, 158 U.S. 601 @ 625.]

[See also Commissioner v. Weisman, 197 F.2d 221, 224 (1952):  
“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”

In order for the federal income tax to be consistent with the existing judicial definition of direct, the property “labor” must also be off set from the receipts (wages). If not, why not? The Supreme Court made no distinction between capital and labor when they defined the meaning of income under the 16<sup>th</sup> Amendment. Or, the imposition of the tax must be consistent with that of an excise upon the transaction or activity producing those receipts; otherwise it must be held repugnant to the Constitution.

“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.” [United States v. Wells Fargo Bank, 485 U.S. 351, 355 (1988)]

Commercial net income is the beginning point of the statutory power to tax “income,” not the receipts shown on the schedules used to determine that net income (accounting process). If the beginning point (subject matter) of the excise were the receipts, or the property producing those receipts, then

the income tax, by judicial definition, would be direct and therefore repugnant to the Constitution.

Therefore, we raised these questions of statutory construction in our request for determination of status and in our suit for refund;

Is everyone who labors for a living necessarily “classified” as being either a single owner corporation, or a sole-proprietor, in compliance with the statutory definition of “person” recorded in 26CFR301.7701-1,-2,-3 and 26CFR31.0-2(a) (8)? If so, then the mere fact that some within the “classification” are allowed to deduct their business related expenses above the line, while others (the common laborer) are required to deduct those expenses below the line, would reek with discrimination between members of the same “class. [Oregon.L.S.R. v. Dept. of Revenue, 9<sup>Th</sup> Circuit, 97-35025 [10]]

Are all “wages” earned by labor “classified” as commercial net income (compensation for services), in accordance with the requirements of the statute as a whole, as well as Article 1, Section 8? If so, then there is a major conflict with the existing judicial definition of direct, as well as a discrimination between members of the same class that would make the

statute repugnant to the Constitution under the “due process” clause of the Fifth Amendment.

And, does the phrase “gross income, means all income from whatever source derived” [26USC61(a)] refer to the term “income” as being the receipts, or the gross amount of “gain” derived from those receipts? If it is the receipts; then it is repugnant to the Constitution for lack of apportionment. If it is the gross gain derived from those receipts; then does the common law “labor for hire” employee fall within the specific definition of “person,” so that the tax remains an excise under Article 1, Section 8, of the United States Constitution?

## CONCLUSIONS

Whereas Counsel for the United States has acknowledged our position (Motion, page 2-3), they have not refuted our interpretation of the statutory language, nor have they presented any legislative, statutory, or judicial evidence contradicting our interpretation.

By allowing the Department of Justice to ignore their responsibility to answer our accusations, we must conclude that, whereas, the federal income tax is an excise imposed upon business, commercial, and financial activities,

it is also a “Capitation, or other direct, tax” imposed upon the common laborer.

Our reasoning is that the “taxpayer’s” tax burden is measured by the amount of commercial net income (profit) derived during the year from all sources [line 22 of the 1040 Tax Return]. Whereas, for the common laborer (not in business), having no other source of income (gains), the measurement used is their total annual receipts [line 7 of the 1040 Tax Return]. Both people report “total income” on line 22 of the individual Tax Return Form 1040. Note that the term “total income,” shown on line 22, is deceptive, for it includes both meanings of the term “income”. [Lukhard v. Reed, 481 U.S. 368, 374-376 (1987)] As this conclusion would be repugnant to the Constitution, there must be a different interpretation of the statute’s construction.

The subject matter of the excise is controlling, as stated by the Supreme Court in Educational Films Corp. v. Ward, 282 U.S. 379 @ 394-395 (1931):

“Were it not for Flint v. Stone Tracy Co. it would be difficult to suggest any reason for ignoring the rule so often laid down in the earlier cases, that the validity of the tax will depend not on what is named as the subject of the tax, but on its effect.”

And, the Supreme Court, in *USNB of Oregon v. Independent Ins.*

*Agents*, 508 U.S. 439 @ 455 (1993) stated:

“Over and over we have stressed that “[I]n 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 object and policy.” ...”No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning. Statutory construction “is a holistic endeavor”... and at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.” [...Citations omitted by me]

We are requesting a rehearing en banc, because our questions do raise substantial controversy.

Respectfully submitted,

John Gary Given

February 18, 2006

Michele Louise Given

February 18, 2006