

THE INCOME TAX IS AN EXCISE TAX ARISING ONLY UPON THE HAPPENING OF DISTINGUISHED TAXABLE EVENTS

The income tax is an excise, and applies only to objects suited to an excise. It is not, and cannot lawfully be imposed as, a capitation or other direct tax. This is settled law in the United States, being expressly declared and re-affirmed by the United States Supreme Court both before and after the 16th Amendment, repeatedly and consistently:

"[T]axation on income [is] in its nature an excise, entitled to be enforced as such..."

[*Brushaber v. Union Pacific R. Co.*](#), 240 U.S. 1 (1916), in a unanimous decision re-iterating its conclusion in *Pollock v. Farmer's Loan & Trust*, 157 U.S. 429 and 158 U.S. 601 (1895).

"We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this **erroneous assumption** will be made clear by generalizing the many contentions advanced in argument to support it..."

Ibid (emphasis added)

The *Brushaber* court goes on to point out that the very suggestion of a non-apportioned direct tax (whether on "incomes" or anything else) is completely incoherent, because that would cause:

"...one provision of the Constitution [to] destroy another; that is, [it] would result in bringing the provisions of the Amendment [supposedly] exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. ... This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.""

Ibid.

The Supreme Court re-iterates the *Brushaber* holding repeatedly over the decades:

"[B]y the [*Brushaber*] ruling, it was settled that **the provisions of the Sixteenth Amendment** conferred no new power of taxation, but **simply prohibited** the previous complete and plenary power of **income taxation** possessed by Congress from the beginning **from being taken out of the category of indirect taxation to which it inherently belonged**, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived -- that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed."

[*Stanton v. Baltic Mining Co.*](#), 240 U.S. 103 (1916) (emphasis added).

"If [a] tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. *Burnet v. Brooks*, 288 U. S. 378, 288 U. S. 403, 288 U. S. 405; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 240 U. S. 12."

[*Steward Machine Co. v. Collector of Internal Revenue*, 301 U.S. 548 \(1937\)](#) (emphasis added).

"[T]he sole purpose of the Sixteenth Amendment was to remove the apportionment requirement **for whichever incomes were otherwise taxable.** 45 Cong. Rec. 2245-2246 (1910); *id.* at 2539; *see also Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 240 U. S. 17-18 (1916)"

[*South Carolina v. Baker*, 485 U.S. 505 \(1988\), fn 13](#) (emphasis added).

Contemporaneous and subsequent analysis by both private, executive branch and legislative branch experts acknowledge the *Brushaber* holding as settled law, to which all courts and agencies are subject:

"The Sixteenth Amendment does not permit a new class of a direct tax... The Amendment, the [Supreme] court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the *Pollock* case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong."

[Cornell Law Quarterly, 1 Cornell L. Q. pp. 298, 301 \(1915-1916\)](#)

"In *Brushaber v. Union Pacific Railroad Co.*, Mr. C. J. White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that **an income tax is "indirect," rather than ... an exception to the rule that direct taxes must be apportioned.**"

[Harvard Law Review, 29 Harv. L. Rev., p. 536 \(1915-1916\)](#)

"The income tax... ...is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax; it is the basis for determining the amount of tax."

and,

"[T]he amendment made it possible to bring investment income within the scope of the general income-tax law, but did not change the character of the tax. It is still fundamentally an excise or duty..."

[House Congressional Record, March 27, 1943, p. 2580](#), testimony of former Treasury Department legislative draftsman F. Morse Hubbard, (emphasis added).

"The Supreme Court, in a decision written by Chief Justice White, first noted that **the Sixteenth Amendment did not authorize any new type of tax, nor did it repeal or revoke the tax clauses of Article I of the Constitution, quoted above. Direct taxes were, notwithstanding the advent of the Sixteenth Amendment, still subject to the rule of apportionment...**"

[Report No. 80-19A, 'Some Constitutional Questions Regarding the Federal Income Tax Laws'](#) by Howard M. Zaritsky, Legislative Attorney of the American Law Division of the Library of Congress (1979) (emphasis added).

Income tax return forms, both before and after the 16th Amendment, acknowledge the excise character of income taxation, and that taxable "income" is a *distinguished subclass* of what comes in, rather "all that come in":

"I hereby certify that the following is a true and faithful statement of the gains, profits, or income of _____, of the _____ of _____, in the county of _____, and State of _____, whether derived from any kind of property, rents, interest, dividends, salary, or from any profession, trade, employment, or vocation, or from any other source whatever, from the 1st day of January to the 31st day of December, 1862, both days inclusive, **and subject to an income tax under the excise laws** of the United States."

[The affirmation on the first income tax return form](#) (emphasis added).

"I swear or affirm that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all **taxable** gains, profits and income received by me during the year for which the return is made,...

[The affirmation on the 1916 income tax return form](#) (emphasis added).

The income tax is an excise. Congress says so, the Executive says so, the Supreme Court says so. All also affirm that to be subject to the tax, or a measure of the tax, any given gain must be distinguished by connection with taxable events or activities. The income tax is NOT a tax on all that comes in.

Instead, because the tax IS an excise, as *Brushaber* actually and unmistakably rules, and as the Supreme Court repeats many times over the decades, someone's earnings could only qualify as taxable (or as a measure of tax liability) if they are products of privileged activities. See [Thomas v. United States, 192 U. S. 363 \(1904\)](#); [Flint v. Stone Tracy Co., 220 U.S. 107 \(1911\)](#) ("As was said in the *Thomas* case, 192 U. S. 363, supra, the requirement to pay [excise] taxes involves the exercise of privileges...")

The "privilege" element.¹ of the income tax is established independently of the legal character and constraints native to excises, as well. A tax on, or measured by, *unprivileged* receipts is a capitation:

"..Albert Gallatin, in his Sketch of the Finances of the United States, published in November, 1796, said: 'The most generally received opinion, however, is that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people;...'

"He then quotes from Smith's Wealth of Nations, and continues: 'The remarkable coincidence of the clause of the constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes-- an acceptance of the word peculiar, it is believed, to Dr. Smith-- leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from, and falling immediately on, the revenue;...'"

[Pollock v. Farmer's Loan & Trust, 157 U.S. 429 \(1895\)](#)

"The taxes which, it is intended, should fall indifferently upon every different species of revenue, are capitation taxes,"... " In the capitation which has been levied in France without any interruption since the beginning of the present century, ... people are rated according to ... what is supposed to be their fortune, by an assessment which varies from year to year." ... "[I]n the first poll-tax [some] were assessed at three shillings in the pound of their supposed income,..."

[Adam Smith, 'An Inquiry into the Nature and Causes of the Wealth of Nations', Book V, Ch. II, Art. IV \(1776\)](#)

"CAPITATION, A poll tax; an imposition which is yearly laid on each person according to his estate and ability."

[Bouvier's Law Dictionary, 6th Ed. \(1856\)](#). (The official law dictionary of Congress when the income tax was enacted.)

¹ "Case law recognizes no distinction between a privilege tax and an excise tax. See *Bank of Commerce & Trust Co. v. Senter*, 260 S.W. 144, 148 (Tenn. 1924) ("Whether the tax be characterized in the statute as a privilege tax or an excise tax is but a choice of synonymous words, for an excise tax is an indirect or privilege tax."); *American Airways, Inc. v. Wallace*, 57 F.2d 877, 880 (M.D. Tenn. 1937) ("The terms 'excise' tax and 'privilege' tax are synonymous and the two are often used interchangeably."); see also 71 AM JUR. 2d State and Local Taxation §24, ("The term 'excise tax' is synonymous with 'privilege tax,' and the two have been used interchangeably. Whether a tax is characterized in the statute imposing it as a privilege tax or an excise tax is merely a choice of synonymous words, for an excise tax is a privilege tax.") Thus, the excise tax now before us is, by more complete description, purportedly an excise upon a particular privilege, assessed according to the quantity of substance possessed in enjoyment of such privilege."

[Waters v. Chumley, No. E2006-02225-COA-RV-CV CoA of Tenn. \(2007\)](#)

Further, taxes on the exercise of rights are inherently direct, regardless of the label put upon them:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights;..."

[Knowlton v. Moore, 178 U.S. 41 \(1900\)](#)

Engaging in unprivileged economic activity and receiving and enjoying the fruits therefrom is a right:

"The right to follow any of the common occupations of life is an inalienable right... It has been well said that 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property'. Smith, Wealth of Nations, Bk. I, c. 10."

[Butcher's Union Co. v. Crescent City Co., 111 U.S. 746 \(1883\)](#)

"Included in the right of personal liberty and the right of private property- partaking of the nature of each- is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property"

[Coppage v. Kansas, 236 U.S. 1 \(1915\)](#)

"Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as privilege."

[Jack Cole Co. v. MacFarland, 337 S.W.2d 453 \(S. Ct. of Tenn. 1960\)](#)

"[Although the Legislature may declare as privileges and tax as such for State revenue purposes those pursuits and occupations that are not matters of common right], the Legislature has no power to declare as a privilege and tax for revenue purposes occupations that are of common right."

"The right to engage in an employment, to carry on a business, or pursue an occupation or profession not in itself hurtful or conducted in a manner injurious to the public, is a common right, which, under our Constitution, as construed by all our former decisions, can neither be prohibited nor hampered by laying a tax for State revenue on the occupation, employment, business or profession. ... Thousands of individuals in this State carry on their occupations as above defined who derive no income whatever therefrom. But, where an income is derived from any occupation, business, profession or employment, then the Legislature may lay thereon a tax..."

[Sims v. Ahrens, 167 Ark. 557, 594, 595 \(Ark S. Ct. 1925\)](#)

Capitations and other direct taxes are prohibited by the United States Constitution unless apportioned:

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

[United States Constitution, Article 1, § 9, cl. 4](#)

As has been exhaustively shown, this Constitutional rule has never changed, and the 16th Amendment in no way authorized a non-apportioned capitation or other direct tax. Hence, the unapportioned income tax cannot (and does not) fall "indifferently on every different species of revenue" but only falls on revenue distinguished by its connection to an exercise of privilege.

The limited scope of the tax as actually authorized, written and ruled upon is interestingly underscored by recent corrupt efforts by certain members of the federal judiciary and executive branch to claim that *Brushaber* holds that the 16th Amendment authorizes a non-apportioned direct tax. See, for example,

"[T]he income tax is a direct tax,... See *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 19, 36 S.Ct. 236, 242, 60 L.Ed. 493 (1916) (the purpose of the Sixteenth Amendment was to take the income tax "out of the class of excises, duties and imposts and place it in the class of direct taxes").

[United States v. Francisco, 614 F.2d 617, 619 \(8th Cir. 1980\)](#)

On the website and in many of the publications produced by the IRS this same false claim is made, as in the example below:

The Law:

The courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid. In *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990), cert. denied, 500 U.S. 920 (1991), the court cited *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12-19 (1916), and noted that the U.S. Supreme Court has recognized that the "Sixteenth Amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation."

<https://www.irs.gov/businesses/small-businesses-self-employed/anti-tax-law-evasion-schemes-law-and-arguments-section-iv> (last entry on the page)

These false statements of the *Brushaber* ruling-- which are not, it should be noted, mere "misconstructions" or even disagreements with what the court says, but rather are express ascriptions to the *Brushaber* court of language and declarations which it does not say and which

are the exact opposite of what it does say-- have been used to justify applying or enforcing the income tax upon unprivileged earnings (or the activities which produced them). This deception for this purpose powerfully emphasizes that the *Brushaber* ruling (and all other authority) does *not* allow application of the tax to unprivileged earnings or activities (and instead prohibits it).



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