No. _____

In the Supreme Court of the United States

Brian E. Harriss,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

Brian E. Harriss
[redacted]
Petitioner, pro se

QUESTIONS PRESENTED

This Court has held that non-apportioned direct taxes are Constitutionally prohibited and remain so after the adoption of Amendment XVI to the U.S. Constitution ("Amendment"), and that it is erroneous to assume that the Amendment gave Congress the "power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes." *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 11 (1916). This Court reaffirmed this holding in its decisions in *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916), *Taft v. Bowers*, 278 U.S. 470, 481 (1929), and *So. Carolina v. Baker*, 485 U.S. 505 (1988).

This Court further observed that, in its earlier decision in *Pollock v. Farmer's Loan & Trust*, 157 U.S. 429 (1895),

> [we] 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, supra, 240 U.S. at 17.

The questions presented are:

1. Did the Ninth Circuit commit reversible and plain Constitutional error by recharacterizing, without evidence, Petitioner's right to refute

QUESTIONS PRESENTED – Continued

Commissioner's presumptive, and not conclusive, evidence of its correctness, that all of Petitioner's earnings are excisable gains?

2. Did the Ninth Circuit Court of Appeals, without evidence and in conflict with Constitutional restrictions on the implementation of Congressional taxing power, err by affirming deficiencies on the premise that all earnings, and not just excisable gains, may be taxed directly without apportionment?

3. Alternatively, under this Court's decisions, the Amendment notwithstanding, is the income tax, as it is currently administered throughout the country, effectively a non-apportioned tax on the revenue of the people that is prohibited, or subject to apportionment by the U.S. Constitution, Article 1, Sections 2 and 9?

RELATED CASES

- *Harriss v. Commissioner,* consolidated Nos. 12528-14 and 25358-14, United States Tax Court. Decision entered May 2, 2017.
- *Harriss v. Commissioner*, No. 17-72233, United States Court of Appeals for the Ninth Circuit. Memorandum Opinion filed August 27, 2019.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Brian E. Harriss, *pro se,* petitions this Court for a Writ of *Certiorari* to review and reverse the final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States Tax Court finding deficiencies in income tax and penalties for tax years 2010 and 2011 because Mr. Harriss did not report all of his earnings as taxable income.

OPINIONS BELOW

Petitioner has reproduced in his Appendix the Ninth Circuit's unpublished Memorandum Opinion issued on August 27, 2019 (A-15), the Tax Court's January 5, 2017 Memorandum Findings of Fact and Opinion (A-1) and its final Decisions issued on May 2, 2017 (A-13-A-14).

JURISDICTION

The opinion of the Court of Appeals was entered on August 27, 2019. Petitioner sought from this Court and obtained an extension to file this Petition until January 24, 2020. This Court has jurisdiction under 26 U.S.C. §7482(a)(1) and 28 U.S.C. §1254(1).[1]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article 1, Sections 2, 8 and 9; Amendment I; Amendment V; Amendment XVI (A-17).

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[1] All section references are to the 1986 Internal Revenue Code unless otherwise indicated.

STATEMENT OF THE CASE

In a three-paragraph, cursory ruling, on the stipulated fact that Mr. Harriss earned money in the relevant years, the Ninth Circuit Court of Appeals affirmed a proposed income tax deficiency against Mr. Harriss (as well as penalties) on the ground that he had received "compensation for services" and improperly omitted those amounts from gross income and that, therefore, he owed federal income tax on all of those earnings.

But Mr. Harriss had not stipulated—and, in fact, had denied—that he had been a service provider who received "compensation for services" or that he had engaged in activities of any kind relevant to the income tax. The evidence did not support a finding that he had engaged in taxable activity or had received *wages* or *trade or business* income or any other measure of activity subject to a Constitutionally-administered excise on incomes. The courts below simply reframed his Stipulations using terms defined by Congress, and declared that his receipts, thus re-named, were taxable.

The action of the courts below was not merely incorrect on the facts and the law. The deficiency determination under review was upheld on one of two grounds that demand this Court's attention and resolution. Either the Ninth Circuit simultaneously acknowledged the nature of the income tax as an excise (why else recharacterize Petitioners' stipulations to conform to statutory and historical definitions relevant to such a tax?) while it deprived him of his property in derogation of the Rules of Court and his Constitutional rights, or, it doesn't matter how his earnings were characterized (and all

argument concerning the tax as an excise was frivolous), because the Amendment authorized a new species of tax – *i.e.,* a non-apportioned, direct tax on all that comes in, and therefore Mr. Harriss's personal revenue, and not just the gain derived therefrom, was taxable directly. *See* §61 and the statutes on which that section is derived. A-18-A-22. Reply Brief, pp. 18-19.

The Constitutional conundrum that this case presents is of imperative public importance precisely because it is not unique, but, rather, represents the new norm. Calling the tax a Constitutional excise while taxing the public directly, without apportionment, is putting form over substance and subjecting the citizenry to exaction, which violates their rights to due process of law. 26 C.F.R. §601.106(f)(1). A-17; A-30. This is especially true in cases such as this one where the courts rewrote the facts to aid the government's cause and to give the decision a lawful veneer. Moreover, the current administration of the tax multiplies confusion and threatens to destroy both the productivity of the people and the Constitutional framework on which our nation rests. *See Brushaber, supra,* 240 U.S. at 12.

A. Background proceedings.

Mr. Harriss petitioned the U.S. Tax Court for a redetermination of an income tax deficiency proposed by Respondent for tax years 2010 and 2011. The cases eventually were consolidated. Despite the fact that Mr. Harriss and Respondent had arrived at, and jointly signed, a motion under Tax Court Rule 122 to submit the case as fully stipulated, Respondent's counsel mendaciously suggested to the trial court

that Mr. Harriss had objections to the record, might not show up in court, and was otherwise problematic. Based on these false representations, the Tax Court ordered the parties to appear at, and conduct, an unnecessary trial. At the trial, the Tax Court admitted patently inadmissible piles of documents into the record, and, in violation of Tax Court Rule 91, allowed Respondent's counsel to change or qualify Respondent's stipulations. Opening Brief, pp. 6-9. Cross motions for sanctions were denied. Post-trial simultaneous briefing was completed on March 25, 2016.

On January 5, 2017, the Tax Court issued its Memorandum Findings of Fact and Opinion upholding the proposed deficiencies. A-1. Many of the facts that the trial court found, but that had not been stipulated, had no evidentiary support. Even worse, the trial court erroneously characterized many of the facts found as stipulated, when actually they never had been. The Tax Court subsequently entered two separate decisions on May 2, 2017, one for each of the two cases that had been consolidated. Reply Brief, p. 1.

Mr. Harriss appealed the Tax Court decision to the Ninth Circuit Court of Appeals. The Ninth Circuit, claiming to have reviewed the legal conclusions *de novo* and the factual findings for clear error (A-15), apparently did not do so by resort to the record. It merely found, "the record showed that Harriss had earned taxable income, and the legal basis for Harriss's argument to the contrary was frivolous." Since the record did not show that Mr. Harriss engaged in an *excisable* activity, nor did the record contain the concessions or stipulations that the Tax Court attributed to him (*e.g.,* compare Trial

Tr. p. 24, Stipulation 12, and A-3), and since Respondent's inadmissible evidence was not offered to prove any of Respondent's late-raised assertions made in violation of Tax Court Rule 91 (Op. Br. 35-36; A-6-A-7), the decision of the Court of Appeals essentially was that Mr. Harriss was paid money and therefore owed federal income tax. But the Court of Appeals was careful to phrase it that Mr. Harriss earned "compensation for labor or services, paid in the form of wages or salary," A-16, things that Mr. Harriss had denied and for which there was no evidence. On this ground, the Court of Appeals also upheld the late-filing and accuracy-related penalties. A-16.

Petitioner seeks a writ of *certiorari*.

B. The basis for jurisdiction in the trial and appellate courts.

Under §6214(a), the U.S. Tax Court had subject matter jurisdiction to review and to redetermine the Commissioner's determination of a tax deficiency set forth in a statutory notice. On August 2, 2017, Petitioner timely filed his Notice of Appeal to the Court of Appeals of the May 2, 2017 final decision of the Tax Court.

REASONS WHY THIS PETITION SHOULD BE GRANTED

Either the Ninth Circuit's decision to uphold a tax deficiency against Mr. Harriss was in violation of the limits on income tax administration established in Article 1, sections 2, 8 and 9 of the U.S.

Constitution and therefore void,[2] or, in the alternative, the income tax itself, as administered today, is a direct tax that either must be apportioned or struck down as unconstitutional.

The outcome depends entirely on whether this Court will uphold its prior decisions in *Brushaber, supra,* and *Stanton, supra*, among others, or whether it will declare that the Fifth, Seventh, Eighth, Tenth, and the Ninth Circuits have correctly held that the Amendment created a "new species of tax" called a non-apportioned direct tax on incomes. If this Court finds the latter, then the Amendment itself must be struck down because it has caused one portion of the Constitution to be in irreconcilable conflict with another, with all the evils attendant thereto. *See Brushaber, supra,* 240 U.S. at 11-12.

This Court should grant *certiorari* to resolve this crucial area of income tax law, because declining to do so will be seen as tacit approval to continue its unlawful administration.

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[2] If a direct tax is not apportioned, "not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void." *Springer v. United States*, 102 U.S. 586, 595 (1881) (sustaining the Civil War income tax laws, holding that the tax based on income was not a direct tax but was fundamentally an excise or duty and as such did not require apportionment among the States).

I. The decision of the Ninth Circuit Court of Appeals enforces the federal income tax law in a way that conflicts with this Court's decisions in *Brushaber, supra*, and *Stanton, supra*.

In 1895, in the *Pollock* case, this Court held sections 27-37 of the Revenue Act of 1894 invalid. The Court reasoned that to apply the tax to gains derived in connection with the ownership of property (either the stock on the basis of which dividends were paid or real estate from which rents were derived) amounted to a tax on the property itself, and thus failed to pass Constitutional muster for lack of apportionment in its administration.

By 1913, Amendment XVI was adopted to overrule the *Pollock* Court's holding that an income tax on rents and dividends must be apportioned simply because those excisable gains derived from property. Three years later, in *Brushaber, supra,* Chief Justice Edward White penned the landmark opinion for a unanimous Court, addressing and definitively settling the meaning and effect of the newly-adopted Amendment. Justice White understood that the Amendment simply eliminated *Pollock*'s shielding from the well-established income excise tax of privilege-based gains derived from dividends and rents.

In *Brushaber*, this Court reaffirmed its previous rulings that the income tax is an excise tax. Further, it clarified that the adoption of the Amendment did not change the character of the tax as an excise and that the Amendment did not, and could not, authorize a non-apportioned direct tax. *Brushaber,* 240 U.S. at 11.

> 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...

Id., 240 U.S. 10-11 (emphasis added). In fact, this Court held that the proposition that the Amendment could have established a non-apportioned direct tax is erroneous and repugnant to the Constitution, because such a tax would rely on, and create, an untenable Constitutional internal conflict.

> But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned.

Id., 240 U.S. 11-12. In fact, this Court explained, if the Amendment authorized a direct tax that is not subject to the rule of apportionment, "instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, [this result] would create radical and destructive

changes in our constitutional system and multiply confusion." *Id*., 240 U.S. 12.

The *Brushaber* Court was prescient. Today, as it increasingly has been since the mid-1940s,[3] and as clearly shown in the case below, the income tax law is being administered as if the Amendment had authorized a non-apportioned, direct tax on the revenue of the people. As this Court presaged, this unlawful administration has created "radical and destructive changes in our constitutional system" and has "multipl[ied] confusion."[4]

It is the opportunity, and obligation, of this Court to examine "the far-reaching effect of this erroneous assumption" (*id*., 240 U.S. 11) about the nature of the tax, not only as it pertains to the individual Petitioner, Brian Harriss, but as it pertains to all taxpayers.

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[3] From 1913 to 1939, on average, only 9.4% of earning Americans filed tax documents and returns, and even during World War I and the 1920s, the highest annual percentage of income tax filings during that period was only a little over 17%. But in the early 40s and in the midst of World War II, in part due to state public appeal campaigns aimed at raising war-time revenues, the percentage rose to more than 80%. But, had the 1913 Amendment created a universal, non-apportioned tax on all revenue, no such campaigns would have been necessary, and the "compliance" would have neared today's rates before the date of the Brushaber decision. *See* chart at "Income Equality in the United States 1913 to 1958," Thomas Picketty, EHES, Paris, and Emmanual Saez, U.C. Berkeley and NBER, p. 65. https://eml.berkeley.edu/~saez/piketty-saezOUP04US.pdf

[4] Justice White then proceeded to conduct "a demonstration of the error of the fundamental proposition as to the significance of the Amendment." *Brushaber*, 240 U.S. 12.

A. The Ninth Circuit erred in ruling on the premise, already discredited by this Court in *Brushaber*, *supra*, and *Stanton*, *supra*, that the Amendment authorized a non-apportioned direct tax.

1. *Brushaber* set aside the notion of a non-apportioned direct tax on incomes as an "erroneous assumption."

Brushaber essentially held that the purpose and effect of the Amendment is merely the overruling of a mistaken reasoning of the majority of this Court in the 1895 *Pollock* decision that, when applied to dividends and rent, taxation must be viewed in light of the personal-property sources from which those particular gains are derived. Based on that faulty reasoning, the 1895 Court had held that even the then-33-year-old income tax, when applied to such gains, must be treated as a property tax requiring apportionment.

After this Court's decision in *Brushaber*, this Court reaffirmed the holding that, after adoption of the Amendment—which, by overruling the *Pollock* treatment of gains derived from rents and dividends, only underscored the excise nature of the tax—the income tax remains an excise and that non-apportioned direct taxes remain prohibited.

> [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, supra, 240 U.S. at 113.

Twenty years after *Brushaber*, in *Steward Machine Co. v. Collector of Internal Revenue,* 301 U.S. 548 (1937), this Court rejected the argument that a federal tax on "income" (in this case under the provisions of the Social Security act) can be construed as a direct non-apportioned tax authorized by the Amendment:

> 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 Whether the [income] tax is to be classified as an "excise" is in truth not of critical importance [for purposes of this analysis]. If not that, it is an "impost," or a "duty." A capitation or other "direct" tax it certainly is not.

Steward, supra, 301 U.S. at 581. (Emphasis added.)

2. Capitations that are not apportioned are prohibited by the Constitution.

A capitation is a direct tax, like other "taxes directly on property because of its ownership." *Brushaber*, 240 U.S. 15. As this Court had explained previously, "Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights;…." *Knowlton v. Moore*, 178 U.S. 41, 47 (1900).

In contrast, an excise is a privilege tax. *See*, generally, *Waters v. Chumley*, No. E2006-02225-COA-RV-CV (Tenn. App. 2007), which pointed out that, with respect to state taxation on the conduct of business, for example, "[c]ase law recognizes no distinction between a privilege tax and an excise tax," citing 71 AM JUR.2d State and Local Taxation §24, ("The term 'excise tax' is synonymous with 'privilege tax,…."')." The principle applies equally to any excise, and it is its nature *as* an excise that allows the income tax to pass Constitutional muster. *See,* generally, *Chase Nat. Bank v. United States*, 278 U.S. 327, 334 and 336-337 (1929) (in which this Court treated an "excise or privilege tax" synonymously and held that it is the privilege which Constitutionally may be taxed without apportionment). "Privilege" is defined as:

> A particular benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens….A particular right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others.

Black's Law Dictionary, 6th Edition.

Excises are avoidable and fall on privileges, consumption, and use, whereas direct taxes are unavoidable and fall on property, ownership, and persons, their revenue, and their possession and enjoyment of rights. In line with this reasoning, the tax act levying a tax without apportionment on carriages "for the conveyance of persons," passed on by this Court in *Hylton v. United States*, 3 Dall. 171 in 1796, "was not levied directly on property because of its ownership but rather on its use and was therefore an excise, duty or impost." *Brushaber*, 240 U.S. 14. In *Pollock*, this Court had concluded that "the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment,…" *Brushaber*, 240 U.S. 16.

A tax on unprivileged activities or occupations is a capitation, a type of direct tax. On the Framers' understanding and use of the term, this Court, in *Pollock, supra,* drew upon the analysis of Albert Gallatin.[5]

> 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**; by indirect, such as are raised on their expense....' He then

[5] Albert Gallatin was a United States senator, a member of the House of Representatives, an ambassador to the United Kingdom and France, and the longest-serving Secretary of the Treasury in U.S. history.
https://www.federalreservehistory.org/people/albert_gallatin

> quotes from [Adam] 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 acceptation 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, supra, 157 U.S. at 569-570 (emphasis added). Adam Smith described capitations in *Wealth of Nations*, as "taxes which, it is intended, should fall indifferently upon every different species of revenue....Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book V, Ch.II, Art. IV (1776) (Smith was referring to wages in its common sense and not the custom-defined legal term found in the Internal Revenue Code.)

Also found in Gallatin's treatise is the following description of a direct tax on personal property which requires apportionment in its application. Today, this passage could be describing our modern-day income tax as it is currently applied:

> Personal property, perpetually shifting, requires a yearly valuation. . . . His capital employed in commerce, the debts which are due to him (from which must be deducted those he owes), his money, and even his stock in goods, must either

> be assessed according to his own declaration, or be estimated in an arbitrary manner. And when the tax is laid upon the revenue and not upon the capital of persons, when the profits of their industry are also to be calculated, it may truly be asserted that… the most odious of [vexatious excises] would be less oppressive, unequal, and unjust than a direct tax levied in that manner.

Albert Gallatin, *The Writings of Albert Gallatin*, ed. Henry Adams (Philadelphia: J.B. Lippincott, 1879). 3 vols. 1/12/2020, p . 167.[6]

Gallatin observed that, in France, for example, such capitations "laid with a regard to the conditions of persons, and assessed according to a conjectural proportion of fortunes, industry, and professions, were equally oppressive to the contributors and injurious to the nation." *Id.* Gallatin concluded that "lands and houses are the proper objects of direct taxation, that almost every other species of property must be reached indirectly by taxes on consumption." *Id.* at 168; *Springer, supra,* 102 U.S. at 602.

> So far as the objections raised in the *Pollock* case are concerned, the principle applied to corporations under the act of 1909 with the approval of the Supreme Court might have been extended to individuals engaged in business. In that way investment income of most individuals as well as of corporations could doubtless have been brought under the terms of the act. **And the** fie**l**d of i**n**co**m**e cou**l**d hav**e** b**een** completel**y** covered by applyi**n**g th**e** p**r**inciple th**a**t t**h**e **ownership and management of investment**

[6] https://oll.libertyfund.org/titles/1950#Gallatin_1358-03_421

> property is an activity or privilege with respect to which Congress may impose an excise.
>
> However that may be, Congress chose to remove all doubt by an amendment to the Constitution.

House Congressional Record, March 27, 1943, p. 2580, statement of Rep. Carlson of Kansas incorporating as his own statement a report of former Treasury Department legislative draftsman F. Morse Hubbard ("Congressional Record") (emphasis added).

Clearly, the Framers of the Constitution not only did not intend that the earnings from jobs of common right would be taxed without apportionment, but they took strong measures to protect the citizenry from the burden of such a tax on their ordinary revenue. And at the time of the adoption of the Amendment, it was *not* this undistinguished revenue that Congress termed "income."

Judge Gustafson of the Tax Court recently observed in his concurring/dissenting opinion in *Northern California Small Business Assistants Inc. v. Commissioner of Internal Revenue*, 153 T.C. No. 4 (2019) ("NCSBA") that this Court has emphasized the fact that "income" in a tax context is something other than gross receipts, and must be considered in its Constitutional sense.

> A proper regard for … [the] genesis [of the Sixteenth Amendment], as well as its very clear language, requires also that this amendment shall not be extended by loose construction….
>
> [I]t becomes essential to distinguish between what is and is not "income," as the term is there used, and to apply the distinction, as

> cases arise, according to truth and substance, without regard to form….
>
> "Income may be defined as the gain derived from capital, from labor, or from both combined"….

Eisner v. Macomber, 252 U.S. 189, 206-207 (1920) (emphasis added) (quoting *Doyle v. Mitchell Bros. Co.,* 247 U.S. 179, 185 (1918))…."[T]he essential matter…[is] a gain, a profit." *Eisner v. Macomber*, 252 U.S. at 207; *see also Doyle*, 247 U.S. at 184-189 ("'income'…convey[s]…the idea of gain or increase arising from corporate activities")….

The issue in *Eisner v. Macomber* was the taxability of a stock dividend (raising questions admittedly different from those in this case and in Alpenglow), and the Supreme Court did indeed observe in [*Commissioner v.*] *Glenshaw Glass*, 348 U.S. [426] at 431 [(1955)], that the definition in *Eisner v. Macomber* "was not meant to provide a touchstone to all future gross income questions."

However, even after *Glenshaw Glass*, one can still say: "Implicit in this construction [in *Eisner v. Macomber* of "income" as it is used in the Sixteenth Amendment] is the concept that gain is an indispensable ingredient of 'income,' and it is this concept which provides the standard by which we must determine whether the tax…is a tax on 'income' within the meaning of the 16th amendment." *Penn Mut. Indem. Co. v. Commissioner*, 32 T.C. 653, 680 (1959) (Train, J., dissenting; emphasis in original), *aff'd*, 277 F.2d 16 (3d Cir. 1960). Again, *Eisner v. Macomber*, 252 U.S. at 207, held that "the essential matter…[is]

> a gain, a profit", and this "essential" point is hardly dictum.

NCSBA, supra, 153 T.C. No. 4, *27-32.

Congress taxes something other than a taxpayer's "income" when it taxes gross receipts without accounting for whether those receipts constituted a *gain* from excisable activities.

Since income taxation was inherently indirect even before the adoption of the Amendment, the Amendment did not extend Congress's "taxing power to new or excepted subjects." *Peck v. Lowe*, 247 U.S. 165, 172 (1918); *compare Taft, supra*, 278 U.S. at 481 (the Amendment "confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income"); *So. Carolina v. Baker, supra*, 485 U.S. at 522, fn. 13 ("The legislative history merely shows that the words 'from whatever source derived' of the Sixteenth Amendment were not affirmatively intended to authorize Congress to tax state bond interest **or to have any other effect on** which i**n**comes **w**ere subj**ec**t to **feder**al taxati**o**n, and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes wer**e oth**erwis**e** taxabl**e**," citing 45 Cong. Rec. 2245-2246 (1910)) (emphasis added.)

B. Petitioner raised a dispute in his tax returns grounded on the assumption that this Court's decision in *Brushaber* correctly identified the income tax as a Constitutional excise on distinguished activities.

In the case below, Petitioner had availed himself of his Constitutional right to raise a dispute concerning items of income reported by third parties on information returns, and to disclose that dispute to the IRS on his tax returns. U.S. Constitution, Amendment I. Petitioner's dispute of the characterization of his non-distinguished payments as *wages* or other excise-taxable income was well-grounded in several statutes in which Congress contemplated such a dispute, *e.g.,* 26 U.S.C. §§ 6201(d), 6662(B)(ii)(II), 7491(a)(1), and in the decisions of this Court upholding the income tax as a Constitutional excise. *Hylton, supra; Pollock, supra; Brushaber, supra; Stanton, supra, etc.* Further, legislative draftsmen over the years consistently have explained that, even after the advent of the Amendment, the income tax is still an excise, and non-apportioned direct taxes are still prohibited by the Constitution.

> 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.…[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....

Congressional Record, p. 2580;

> 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).

This Court has made a "deliberate determination as to the fundamental nature of the tax" (Congressional Record, 2579) as an excise, *Springer, supra,* 102 U.S. 602, and this character was "firmly fixed in the minds of those charged with its administration." Congressional Record, 2579. Even while striking portions of the Revenue Act of 1894 as unconstitutional in the *Pollock* case, this Court "still recognized that the income tax was in essence an excise tax." Congressional Record, 2580.

But because the Court of Appeals upheld a deficiency merely on the fact that the Petitioner had stipulated to receiving some kind of payment for his work, the merits of that dispute became irrelevant, as were the statutes, legal definitions and Supreme Court jurisprudence on which Mr. Harriss had relied. A-18-A-30. Indeed, like the Tax Court, the Court of Appeals ignored the evidence, changed the stipulated

facts, and avoided any mention of the governing law in determining that Mr. Harriss had more taxable receipts than he had reported and thus, by court decree, owed a deficiency of tax.

The courts appear to have adopted the position urged by the government, *i.e.,* that what is being enforced is a non-apportioned, direct tax on everything that comes in, in which case this Court must declare that the tax is subject to apportionment, or that it is being unconstitutionally administered. Indeed, the courts below treated Petitioner's dispute—grounded on the notion that the tax is an excise on distinguished activities and gains derived therefrom—as misplaced and even frivolous. The Tax Court declined to hold Respondent to his burden of proof under §6201(d) because the "position" wrongly attributed to Mr. Harriss—that "his wages are not taxable"—does not constitute even a "reasonable dispute" of an item of income. A-5.

The courts below created the pretense that Petitioner's argument was something patently frivolous and easily debunked by attributing to Petitioner an argument that he was careful not to make: "that his wages are not taxable." But Mr. Harriss did not argue that his *wages* were not taxable – he disputed that what he was paid even *constituted* wages, as that term is relevantly, and distinctly, defined by Congress. Petitioner also never argued, as the trial court said he did, that the term wages "does not encompass the compensation he received from his employers." A-7, fn. 4.

Likewise, the Tax Court held that the notices of deficiency were presumed correct because of a third party characterization that his retirement account

was a federal IRA (defined at §408) (see Trial Tr. 24 and A-3) and because Mr. Harriss stipulated that he had received non-distinguished pay for his work (the Tax Court then reframed this stipulation as a concession that he received "compensation for services." A-7. *But see*, *e.g.,* Classification Act of 1923, Sec. 2, A-20-21). Op. Br. 22-23, 25, 32.

This is the heart of the matter – the Tax Court treated *wages* as both generic (*i.e.,* earnings generally) to conclude that all his receipts were *wages* and his dispute was inherently frivolous, and as specific to the tax (*i.e.,* excisable gain as defined, the only *wages* reportable on an information return) to conclude that his receipts were taxable. The "findings of fact" and conclusions of law therefore were schizophrenic and led to an absurdly unjust result, which was adopted in whole by the Court of Appeals.

This treatment suggests that the courts are, indeed, enforcing the income tax law in conflict with the Constitution and, in the case below, with Mr. Harriss's rights. The income tax is, and always has been, an excise on the gains derived from distinguished activities, but the Ninth Circuit committed reversible, and Constitutional, error by recharacterizing, without evidence, all of Mr. Harriss's earnings as excisable gains, or by treating the matter of the character of his earnings as irrelevant to the non-apportioned income tax.

C. Ruling on the mistaken premise that the Amendment authorized such a tax, the Ninth Circuit wrongly upheld a capitation on Mr. Harriss's revenue.

The proposed deficiency of tax against Mr. Harriss was a capitation enforced as if such a tax were lawful. This explains why the Ninth Circuit found no error in the Tax Court's Findings of Fact and Conclusions of Law. A-15-A-16. After all, if the income tax is *not* an excise or duty, but is, instead, a capitation, then Mr. Harriss's record is sufficient to sustain at least the receipt of revenue on which such a direct tax may be imposed. But such a capitation may not be imposed if it is not apportioned. U.S. Const., Article 1, Sec. 2, Clause 3 and Sec. 9. A-17.

If the income tax deficiency upheld by the Court of Appeals is, rather, tax on distinguished activities measured by the gains those activities produce, and therefore Constitutionally subject to an excise, then the Ninth Circuit erred in failing to hold the government to its burdens of proof, and to hold the Tax Court to its duty to apply the Rules of Court. Worse, it erred grievously in allowing the evidence, and lack thereof, to be construed as establishing taxable activity on which such an excise may lawfully be imposed without apportionment.

Alternatively, the Ninth Circuit disposed of this case summarily on the mistaken and destructive notion that there is a third species of tax to which Mr. Harriss is subject – a non-apportioned, direct tax on everything Mr. Harriss received for his work of common right.

II. The Ninth Circuit Court of Appeals' misapplication of the law to its erroneous findings of fact revealed an inherent and fundamental question of the federal tax law and its administration that must be resolved by this Court.

The misapprehension of the *Brushaber* decision, and the unconstitutional imposition and collection of income taxes, is systemic and must be corrected.

The confusion, and erosion of the Constitutional framework, has only grown over the years. The Seventh Circuit observed in 1954: "Before the Sixteenth Amendment Congress could not levy a direct tax without apportionment among the states." *Commissioner v. Obear-Nester Glass Co.,* 217 F.2d 56, 58 (7th Cir. 1954), citing *Pollock*. But this statement implies a view that *after* the adoption of the Amendment, such a tax *could* be levied. Directly after this statement, however, the Seventh Circuit seemed to recognize "income" as a special or distinguished subclass of earnings, even though it may only have been an expression of confusion as to the effect of the Amendment:

> The Amendment allows a tax on "income" without apportionment, but an unapportioned direct tax on anything that is not income would still, under the rule of the *Pollock* case, be unconstitutional.

Id., 217 F.2d 58.

Thus, the Seventh Circuit's view is either that there is a new species of tax—a direct, non-apportioned tax on all earnings (the broader sense of "income" as all that comes in) authorized by the

Amendment—or that there is a unique subset of earnings ("income" in the distinguished sense) that now, as before the Amendment, may be taxed as an excise (and thus, without apportionment). It is the latter view that this Court has taken in *Brushaber* and later decisions.

But more recently, some courts, including the Seventh Circuit, while obviously misreading this Court's ruling in *Brushaber*, have identified the income tax, as it has come to be administered, as a non-apportioned, direct tax without mention of the distinguished nature of the "incomes" subject to that tax. *See, e.g., Parker v. Commissioner,* 724 F.2d 469 (5th Cir. 1984) (stating this Court determined in *Brushaber* "that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax."); *Lovell v. United States,* 755 F. 2d 517, 519 (7th Cir. 1984) ("Plaintiffs also contend that the Constitution prohibits imposition of a direct tax without apportionment. They are wrong; it does not. U.S. Const. amend. XVI; *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir.1984)") (emphasis added)*; United States v. Francisco*, 614 F.2d 617 (8th Cir. 1980) ("the income tax is a direct tax,….*See Brushaber*….)(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. Collins*, 920 F.2d 619 (10th Cir. 1990) ("For seventy-five years, the Supreme Court has recognized that the sixteenth amendment authorizes a direct nonapportioned tax..., *see Brushaber*….").

The Ninth Circuit explicitly articulated this view in *In re Becraft*, 885 F.2d 547 (9th Cir. 1988). Even in

the context of attorney Becraft's purported argument that the issue is tied to residency and that "resident United States citizens are not subject to the federal income tax laws,"[7] which is mistaken, if not frivolous, the Ninth Circuit wholly adopted, as its own, the view that there is no longer only "two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power" as held by this Court (*Brushaber, supra,* 240 U.S. at 13; *Pollock, supra,* 157 U.S. at 557:

> For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization of a non-apportioned direct income tax. . . . [citing *Brushaber*, *Lovell* and *Parker*.]

In Re Becraft, supra, 885 F.2d at 548.

On this view, the Ninth Circuit in the case below held that everything paid to Mr. Harriss was rightly termed "income" and was subject to a direct tax without apportionment. Were these courts, and the Ninth Circuit below, correct in upholding the administration of the tax as a non-apportioned, direct tax? Or, instead, did these courts, as well as the courts below, enforce administration of the tax in violation of the Constitution by relying upon an incorrect interpretation (or a deliberate mis-construction) of this Court's earlier holdings as to the nature of the income tax and the effect of the Amendment? It is a critical question.

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[7] Petitioner says "purported" because it is possible (and common) that the Ninth Circuit recharacterized Becraft's argument, but, in any event, the citizenship point is wide of the mark and is not what petitioner is arguing here.

This Court should exercise its supervisory authority to curb the abuses in income tax administration, and to clarify the law to ensure uniform, national tax administration in harmony with, and obedience to, the Constitution.

Either the income tax law is Constitutional as written and the Ninth Circuit erred in affirming its unlawful administration, or the income tax law, as interpreted by the courts and as currently administered, has fundamentally changed. Setting aside form and examining substance, this Court now must declare it to be unconstitutional as administered, or declare that it is subject to apportionment. Either way, the tax to which Mr. Harriss has been subject for 2010 and 2011 must be declared "direct in the constitutional sense, and [] therefore void for want of apportionment" (*Brushaber, supra,* 240 U.S. at 16), and the decision below upholding a tax on his non-distinguished earnings must be reversed.

CONCLUSION

The writ should issue.

Respectfully submitted on January 24, 2020,

s/Brian E. Harriss
Brian E. Harriss
[redacted]
Petitioner, pro se

APPENDIX

ORDERS

Harriss v. Commissioner, consolidated Nos. 12528-14 and 25358-14, United States Tax Court, Memorandum Findings of Fact and Opinion entered January 5, 2017

T.C. Memo. 2017-5

UNITED STATES TAX COURT

BRIAN E. HARRISS, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 12528-14, 25358-14.

Filed January 5, 2017.

Brian E. Harriss, pro se.
Randall B. Childs and Caroline R. Krivacka, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

VASQUEZ, Judge: In these consolidated cases respondent determined deficiencies, additions to tax, and penalties with respect to Petitioner's 2010 and 2011 Federal income tax as follows:

SERVED Jan 05 2017

[*2]

		Additions to tax		Penalty
Year	Deficiency	sec. 6651(a)(1)	sec. 6651(a)(2)	sec. 6662(a)
2010	$49,968	---	$3,341.33	$3,427
2011	40,259	$3,211.25	---	2,569

After concessions,[1] the issues for decision are: (1) whether compensation petitioner received from his employers is includible in income for the 2010 and 2011 tax years; (2) whether a distribution from petitioner's individual retirement account (IRA) is includible in income for the 2010 tax year; (3) whether petitioner is liable for a 10% additional tax on the IRA distribution under section 72(t) for the 2010 tax year; (4) whether petitioner is liable for an addition to tax under section 6651(a)(1) for the 2011 tax year; (5) whether petitioner is liable for an addition to tax under section 6651(a)(2) for the 2010 tax year; (6) whether petitioner is liable for accuracy-related penalties under section 6662(a) for the 2010 and 2011 tax years; and (7) whether the Court should impose a penalty on petitioner under section 6673(a)(1).[2]

[*3] FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts and the attached exhibits are incorporated herein by this reference.

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[1] Before trial respondent conceded that he had incorrectly included a $29 dividend in petitioner's 2010 income and a $1,174 dividend in petitioner's 2011 income.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code (Code) in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Petitioner resided in Alaska when he timely filed the petitions.

Petitioner is a licensed engineer with bachelor's and master's degrees from the Georgia Institute of Technology. During 2010 petitioner worked as an engineer for Bergaila & Associates, Inc. (Bergaila). Bergaila paid petitioner $26,425 for the services he performed in 2010. That same year petitioner withdrew $28,250 from an IRA that he held at TD Ameritrade. Petitioner was below age 59-1/2 in 2010.

At some point in 2010 not established by the record, petitioner resigned from Bergaila and began working as an engineer for CH2M Hill Alaska, Inc. (CH2M). CH2M paid petitioner a salary of $128,970 in 2010 and $161,000.96 in 2011.

On February 16, 2013, petitioner filed Forms 1040, U.S. Individual Income Tax Return, for the 2010 and 2011 tax years via certified mail in a single envelope addressed to respondent. On his 2010 return he reported zero wages. Petitioner also reported a taxable amount of zero with respect to the above-described IRA distribution. Petitioner attached to his 2010 return three Forms 4852, Substitute [*4] for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. On his Forms 4852 petitioner: (1) claimed that Bergaila had paid him zero wages and withheld $6,984 in Federal income, Social Security, and Medicare taxes; (2) claimed that CH2M had paid him zero wages and withheld $36,429 in Federal income, Social Security, and Medicare taxes, and (3) reported a distribution of $28,250 from his IRA but claimed the taxable amount was zero.

Petitioner also reported zero wages on his 2011

return. He attached to his 2011 return one Form 4852 in which he claimed that CH2M had paid him zero wages and withheld $34,475 in Federal income, Social Security, and Medicare taxes.

In a cover letter accompanying his returns, petitioner explained that he was disputing information returns prepared by Bergaila, CH2M, and TD Ameritrade because "our non-federally-connected work or business arrangement is an entirely private agreement, not involving the exercise of any federal privilege."

Respondent selected petitioner's 2010 and 2011 returns for examination. Following the examination, respondent sent petitioner a timely notice of deficiency for each tax year. The notice for 2010 included petitioner's unreported wages and IRA distribution in income, determined a 10% additional tax on [*5] petitioner's premature IRA distribution, and determined an addition to tax under section 6651(a)(2) and an accuracy-related penalty under section 6662. The notice for 2011 included petitioner's unreported wages in income and determined an addition to tax under section 6651(a)(1) and an accuracy-related penalty under section 6662.

OPINION

I. Preliminary Matters

Petitioner argues that respondent bears the burden of proof with respect to his unreported income for both tax years. For the reasons below, we disagree.

Generally, the Commissioner's determinations in a notice of deficiency are presumed correct, and the taxpayer bears the burden of proving that the Commissioner's determinations are erroneous. See Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115

(1933).[3] Under section 6201(d), if a taxpayer asserts a reasonable dispute with respect to an item of income reported on an information return filed by a third party and the taxpayer meets certain other requirements, the Commissioner bears the burden of producing reasonable and probative evidence, [*6] in addition to the information return, concerning the deficiency attributable to the income item.

Petitioner argues that we should set aside the notices of deficiency because respondent failed to satisfy the requirements of section 6201(d) when he relied only on third-party information returns. However, section 6201(d) is not applicable here because petitioner's frivolous position that his wages are not taxable does not constitute a "reasonable dispute" with respect to an item of income. See, e.g., Nelson v. Commissioner, T.C. Memo. 2012-232, aff'd, 540 F. App'x 924 (11th Cir. 2013).

Petitioner also argues that the presumption of correctness does not apply to the notices of deficiency because respondent failed to establish an evidentiary foundation linking him to income-producing activity. In the Court of Appeals for the Ninth Circuit, to which an appeal of these cases presumably would lie absent a stipulation to the contrary, see sec. 7482(b)(1)(A), (2), the presumption of correctness does not attach in cases involving unreported income unless the Commissioner first establishes an evidentiary foundation linking the taxpayer to the alleged income-producing activity, see Weimerskirch v. Commissioner, 596 F.2d 358, 361-362 (9th Cir. 1979), rev'g 67 T.C. 672 (1977). The requisite

[3] Petitioner has not shown entitlement to any shift in the burden of proof to respondent pursuant to sec. 7491(a). See Higbee v. Commissioner, 116 T.C. 438, 440-441 (2001).

evidentiary foundation is minimal and need not include direct evidence. See [*7] Banister v. Commissioner, T.C. Memo. 2008-201, aff'd, 418 F. App'x 637 (9th Cir. 2011). Once the Commissioner produces evidence linking the taxpayer to an income-producing activity, the burden shifts to the taxpayer "to rebut the presumption of correctness of * * * [the Commissioner's] deficiency determination by establishing by a preponderance of the evidence that the deficiency determination is arbitrary or erroneous." Petzoldt v. Commissioner, 92 T.C. 661, 689 (1989); see also Hardy v. Commissioner, 181 F.3d 1002, 1004 (9th Cir. 1999), §T.C. Memo. 1997-97.

Respondent has adequately established an evidentiary foundation linking petitioner to his employment activity and the IRA withdrawal. Petitioner stipulated that he was compensated by Bergaila and CH2M for his work as an engineer during the years in issue. Petitioner also stipulated that he withdrew funds from a TD Ameritrade retirement account. In his response to respondent's first request for admissions, petitioner admitted that TD Ameritrade had characterized this account as an IRA. Accordingly, respondent's determinations that petitioner had unreported income and is liable for deficiencies for 2010 and 2011 are presumed correct, and petitioner bears the burden of proving that respondent's determinations are erroneous. See Rule 142(a)(1); Welch v. Helvering, 290 U.S. at 115. [*8]

II. Unreported Wage Income

Petitioner concedes that he received the amounts of compensation set out in the notices of deficiency. However, petitioner argues that the compensation he received in 2010 and 2011 was not taxable income within the meaning of the law.

Section 61(a) defines gross income to include "income from whatever source derived". More specifically, section 61(a)(1) includes in an individual's gross income any compensation for services, interest payments, dividend payments, and gains derived from dealings in property. Clearly, petitioner's compensation from Bergaila and CH2M is gross income for Federal income tax purposes. See Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (stating that gross income includes all accessions to wealth that are clearly realized and under the control of the taxpayer); McNair v. Eggers, 788 F.2d 1509, 1510 (11th Cir. 1986) (describing the taxpayer's argument that his wages were not income as "patently frivolous"); Grimes v. Commissioner, 82 T.C. 235, 237 (1984); Reiff v. Commissioner, 77 T.C. 1169, 1173 (1981).

Petitioner's assertion to the contrary, that is, that the payments made to him for his services are not gross income, is frivolous and characteristic of rhetoric that [*9] has been universally rejected by this and other courts.[4] See Wilcox v. Commissioner, 848 F.2d 1007 (9th Cir. 1988), aff'g T.C. Memo. 1987-225. The Court need not address petitioner's assertions "with somber reasoning and copious citation to precedent; to do so might suggest that these arguments have some colorable merit." See

[4] Petitioner acknowledges that "wages" are taxable but argues that the term does not encompass the compensation he received from his employers. This position has been previously rejected by this Court as baseless and subject to the imposition of sec. 6673 penalties. See Waltner v. Commissioner, T.C. Memo. 2014-35, __ F. App'x __, 2016 WL 5800492 (9th Cir. Oct. 5, 2016); Nelson v. Commissioner, T.C. Memo. 2012-232, M, 540 F. App'x 924 (11th Cir. 2013).

Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984); Wnuck v. Commissioner, 136 T.C. 498 (2011). Consequently, we uphold respondent's determinations with respect to petitioner's wage income for 2010 and 2011.

III. IRA Distribution

Petitioner argues that the $28,250 distribution he received from his IRA is not taxable income. We disagree.

Subject to certain exceptions, amounts distributed from an IRA are includible in a taxpayer's gross income as provided in section 72. Sec. 408(d)(1). Petitioner, who has not established that an exception applies, argues that his retirement account was not an IRA. However, petitioner has offered no evidence [*10] supporting this contention. Accordingly, the distribution is includible in petitioner's gross income.

IV. Section 72(t) Tax

IRA distributions made before the taxpayer's attaining the age of 59-1/2 that are includible in income are generally subject to a 10% additional tax unless an exception applies. See sec. 72(t)(1), (2)(A)(i). Because the section 72(t) additional tax is a "tax" and not a "penalty, addition to tax, or additional amount" within the meaning of section 7491(c), the burden of production with respect to the additional tax remains on petitioner. See El v. Commissioner, 144 T.C. 140, 148 (2015). Petitioner, who was under 59-1/2 years of age in 2010, has neither argued nor established that any of the statutory exceptions applies. See sec. 72(t)(2). Accordingly, the distribution is subject to the 10% additional tax under section 72(t).

V. Additions to Tax

A. Section 6651(a)(1)

Respondent determined that petitioner is liable for the section 6651(a)(1) late-filing addition to tax for the 2011 tax year. Section 6651(a)(1) imposes an addition to tax for failing to file a return by the filing deadline (as extended) unless such failure is due to reasonable cause and not due to willful neglect. Pursuant to [*11] section 7491(c), respondent has the burden of production with respect to this addition to tax. See Higbee v. Commissioner, 116 T.C. 438, 446 (2001).

Petitioner stipulated that he filed his 2011 return on February 16, 2013, several months after the extended filing deadline of October 15, 2012. Consequently, respondent has met his burden of producing evidence that the late-filing addition to tax should be imposed for 2011. Petitioner has not demonstrated that he had reasonable cause for his failure to file a timely return. He is therefore liable for the section 6651(a)(1) addition to tax for 2011.

B. Section 6651(a)(2)

Respondent also determined that petitioner is liable for the section 6651(a)(2) late-payment addition to tax for the 2010 tax year. Section 6651(a)(2) imposes an addition to tax for failure to pay the amount of tax shown on a taxpayer's Federal income tax return on or before the payment due date unless such failure is due to reasonable cause and not due to willful neglect. The section 6651(a)(2) addition to tax applies only when an amount of tax is shown on a return filed by the taxpayer or prepared by the Secretary. Sec. 6651(a)(2), (g)(2); Cabirac v. Commissioner, 120 T.C. 163, 170 (2003), aff'd without published opinion, 94 A.F.T.R. 2d (RIA) 2004-5490 (3d Cir. 2004). Pursuant to section 7491(c), [*12] respondent has the burden of production with respect

to this addition to tax. See Higbee v. Commissioner, 116 T.C. at 446. Respondent has not carried his burden here. Petitioner's 2010 return, which respondent received and processed, shows a tax of zero. There is nothing in the record to indicate that a substitute for return (SFR) meeting the requirements of section 6020(b) was ever prepared for the 2010 tax year.[5] We therefore hold that petitioner is not liable for the section 6651(a)(2) addition to tax.

VI. Accuracy-Related Penalty

Respondent also determined that petitioner is liable for accuracy-related penalties under section 6662(a) for the 2010 and 2011 tax years.[6] Pursuant to section 6662(a) and (b)(1) and (2), a taxpayer may be liable for a penalty of 20% [*13] on the portion of an underpayment of tax attributable to: (1) negligence or disregard of rules or regulations or (2) a substantial understatement of income tax. Whether applied because of a substantial understatement of income

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[5] Over petitioner's objection respondent introduced a literal transcript of account for petitioner's 2010 tax year. The literal transcript contains no reference to any SFRs. Even if it did, the literal transcript does not establish that the requirements of sec. 6020(b) were satisfied. See Wheeler v. Commissioner, 127 T.C. 200, 210 (2006), affd, 521 F.3d 1289 (10th Cir. 2008); Gardner v. Commissioner, T.C. Memo. 2013-67, at *24.

[6] For 2010 respondent determined in the notice of deficiency that the underpayment was attributable to one or more of the following: (1) negligence or disregard of rules or regulations, (2) a substantial understatement of income tax, (3) a substantial valuation misstatement, or (4) a transaction lacking economic substance. For 2011 respondent determined in the notice of deficiency that petitioner's underpayment was attributable to a substantial understatement of income tax. In his answer respondent raised the issue of negligence or disregard of rules or regulations as another basis for the accuracy-related penalty for 2011.

tax or negligence or disregard of rules or regulations, the accuracy-related penalty is not imposed with respect to any portion of the underpayment as to which the taxpayer acted with reasonable cause and in good faith. Sec. 6664(c)(1). The decision as to whether the taxpayer acted with reasonable cause and in good faith depends upon all the pertinent facts and circumstances. See sec. 1.6664-4(b)(1), Income Tax Regs. Generally, the most important factor is the extent of the taxpayer's effort to assess his or her proper tax liability. Humphrey, Farrington & McClain, P.C. v. Commissioner, T.C. Memo. 2013-23; sec. 1.6664-4(b)(1), Income Tax Regs.

The term "negligence" in section 6662(b)(1) includes any failure to make a reasonable attempt to comply with the Code and any failure to keep adequate books and records or to substantiate items properly. Sec. 6662(c); sec. 1.6662- 3(b)(1), Income Tax Regs. Negligence has also been defined as the failure to exercise due care or the failure to do what a reasonable person would do under the circumstances. See Allen v. Commissioner, 92 T.C. 1, 12 (1989), af[d, 925 F.2d 348, 353 (9th Cir. 1991); see also Neely v. Commissioner, 85 T.C. 934, 947 [*14] (1985). The term "disregard" includes any careless, reckless, or intentional disregard. Sec. 6662(c).

Petitioner reported zero tax liabilities on his 2010 and 2011 returns. However, petitioner received taxable wage income in both years and, as discussed above, was liable for Federal income tax on his wages. Petitioner therefore had an underpayment for each year within the meaning of section 6662(a). Petitioner does not dispute that he worked during 2010 and 2011 and that he received payments from his employers in the amounts set forth in the notices

of deficiency. In fact, petitioner acknowledges that he received information statements from his employers reporting these payments, but, instead of relying on these statements, he attached to his returns Forms 4852 that reported zero wages.

As discussed above, it is well settled that wages are taxable income and should be reported as such. See, e.g., Wilcox v. Commissioner, 848 F.2d at 1008-1009. Petitioner's position to the contrary demonstrates not only a failure to comply reasonably with the Code, but also negligence and a clear disregard of rules or regulations. Petitioner did not act with reasonable cause and in good faith. Accordingly, the Court holds that petitioner is liable for accuracy-related penalties under section 6662(a) for the 2010 and 2011 tax years. [*15]

VII. Section 6673

Section 6673(a) authorizes the Tax Court to impose a penalty not in excess of $25,000 on a taxpayer for proceedings instituted primarily for delay or in which the taxpayer's position is frivolous or groundless. While petitioner advanced frivolous arguments in this proceeding, we decline to impose a section 6673 penalty against him at this time. However, we warn petitioner that continuing to advance frivolous or groundless arguments may result in substantial penalties in the future.

We have considered the parties' arguments and, to the extent not addressed herein, conclude that they are moot, irrelevant, or without merit.

To reflect the foregoing,

Appropriate orders will be issued, and decisions will be entered under Rule 155.

_____

Harriss v. Commissioner of Internal Revenue, Tax Court No. 12528-14, Decision entered May 2, 2017

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BRIAN E. HARRISS,	)	
Petitioner,	)	Docket No. 12528-14
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed January 5, 2017, and incorporating herein the facts recited in respondent's revised computation as the findings of the Court, it is

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 2011 in the amount of $39,848.00;

That there is an addition to tax due from petitioner for the taxable year 2011, under the provisions of I.R.C. section 6651(a)(1), in the amount of $3,108.50; and

That there is a penalty due from petitioner for the taxable year 2011, under the provisions of I.R.C. section 6662(a), in the amount of $2,486.80.

(Signed) Juan F. Vasquez
Judge

Entered: MAY 2, 2017
Served: May 2, 2017

Harriss v. Commissioner of Internal Revenue, Tax Court No. 25358-14, Decision entered May 2, 2017

UNITED STATES TAX COURT
WASHINGTON, DC 20217

BRIAN E. HARRISS,	)	
Petitioner,	)	Docket No. 25358-14
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed January 5, 2017, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from petitioner for the taxable year 2010 in the amount of $49,958.00;

That there is no addition to tax due from petitioner for the taxable year 2010, under the provisions of I.R.C. § 6651 (a) (2) ; and

That there is a penalty due from petitioner for the taxable year 2010, under the provisions of I.R.C. § 6662(a), in the amount of $3,425.00.

(Signed) Juan F. Vasquez
Judge

Entered: MAY 2, 2017

Served: May 2, 2017

FILED
AUG 27, 2019
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN EDWARD HARRISS, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 17-72233 Tax Ct. Nos. 12528-14, 25358-14 MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Submitted August 19, 2019 **
Before: SCHROEDER, PAEZ, and HURWITZ, Circuit Judges.

Brian Edward Harriss appeals pro se from the Tax Court's decision upholding the Commissioner of Internal Revenue's determination of deficiency for tax years 2010 and 2011. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We review de novo the Tax Court's conclusions of law and for clear error its fact-

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

ual findings. *Meruelo v. Comm'r*, 691 F.3d 1108, 1114 (9th Cir. 2012). We affirm.

The Tax Court properly upheld the Commissioner's deficiency determinations for tax years 2010 and 2011 because the record showed that Harriss had earned taxable income, and the legal basis for Harriss's argument to the contrary was frivolous. *See* 26 U.S.C § 61(a)(1) (explaining that "gross income" includes "compensation for services"); *United States v. Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981) (compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts to be income, and subject to income tax).

The Tax Court did not err by imposing penalties against Harriss for filing an untimely tax return for 2011 and for inaccurately reporting his income for tax years 2010 and 2011. *See* 26 U.S.C. § 6651(a)(1) (addition appropriate when taxpayer fails to file timely taxes unless such failure was due to reasonable cause and not due to willful neglect); *id*. § 6662(a) (imposing penalty for negligence or disregard of rules or regulations).

AFFIRMED.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article 1, Section 2, Clause 3

> Representatives and direct Taxes shall be apportioned among the several States….

U.S. Constitution, Article 1, Section 8

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, …; but all duties, imposts and excises shall be uniform throughout the United States;….To make all laws which shall be necessary and proper for carrying into execution the foregoing powers….

U.S. Constitution, Article 1, Section 9

> No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

U.S. Constitution, Amendment I

> Congress shall make no law…abridging the freedom of speech, …; or the right of the people … to petition the government for a redress of grievances.

U.S. Constitution, Amendment V

> No person shall be….deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XVI

> 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.

STATUTES

Revenue Act of 1862 (37th Congress, Sess. II. Ch. 119. 1862, pp. 472-473)

Sec. 86 *And be it further enacted*, That on and after the first day of August, eighteen hundred and sixty two, there shall be levied, collected, and paid on all salaries of officers, or payments to persons in the civil, military, naval, or other employment or service of the United States, including senators and representatives and delegates in Congress, when exceeding the rate of six hundred dollars per annum, a duty of three per centum on the excess above the said six hundred dollars; and it shall be the duty of all paymasters, and all disbursing officers, under the government of the United States, or in the employ thereof, when making any payments to officers and persons as aforesaid, or upon settling and adjusting the accounts of such officers and persons, to deduct and withhold the aforesaid duty of three per centum, and shall, at the same time, make a certificate stating the name of the officer or person from whom such deduction was made, and the amount thereof, which shall he transmitted to the office of the Commissioner of Internal Revenue, and entered as part of the internal duties; and the pay-roll, receipts, or account of officers or persons paying such duty, as aforesaid, shall he made to exhibit the fact of such payment....

Sec. 90 *And be it further enacted*, That there shall be levied, collected, and paid annually, upon the annual gains, profits, or income of every person residing in the United States, whether derived from any kind of property, rents, interest, dividends, salaries, or from

any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned. if such annual gains, profits, or income exceed the sum of six hundred dollars, and do not exceed the sum of ten thousand dollars, a duty of three per centum on the amount of such annual gains, profits, or income over and above the said sum of six hundred dollars; if said income exceeds the sum of ten thousand dollars, a duty of five per centum upon the amount thereof exceeding six hundred dollars; and upon the annual gains, profits, or income, rents, and dividends accruing upon any property, securities, and stocks owned in the United States by any citizen of the United States residing abroad, except as hereinafter mentioned, and not in the employment of the government of the United States, there shall be levied, collected, and paid a duty of five per centum.

Internal Revenue Code 1986, 26 U.S.C. §61. **Gross income defined.**

(a) General definition Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;

(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

Statutes from which §61(a) of the I.R.C. of 1986 is derived:

Revenue Act of 1921 (67th Congress, Sess. Ch. 136, p. 238), Sec. 213.

That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—
(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), …

Classification Act of 1923, Sixty-Seventh Congress, Sess. IV, p. 1488 (1923), Chap. 265 [repealed in 1949; but text of Rev. Act of 1938 enacted when these provisions were still in force], Sec. 2.

…The term "department" means an executive department of the United States Government, a

governmental establishment in the executive branch of the United States Government which is not a part of an executive department, the municipal government of the District of Columbia, the Botanic Garden, Library of Congress, Library Building and Grounds, Government Printing Office, and the Smithsonian Institution.

…

The term “position” means a specific civilian office or employment, whether occupied or vacant, in a department other than the following: [list of exceptions]

The term “employee” means any person temporarily or permanently in a position.

The term “service "means the broadest division of related offices and employments.

…

The term “compensation” means any salary, wage, fee, allowance, or other emolument paid to an employee for service in a position.

Revenue Act of 1938, Sec. 22(a).

“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States

taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts taxing the compensation of such Presidents and judges are hereby amended accordingly.

Internal Revenue Code of 1939 (**italicized language** added by amendment by the Public Salary Tax Act of 1939, sec. 1), Sec. 22(a).

"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service *(including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing)*, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts taxing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

Internal Revenue Code of 1986, 26 U.S.C. §3121. Definitions.

(a) Wages For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include— [list of exclusions]

(b) Employment For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—[22 enumerated exceptions with subparts]….

(e) State, United States, and citizen
For purposes of this chapter—

(1) State

The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) United States

The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa….

(f) American vessel and aircraft

For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States….

(h) American employer

For purposes of this chapter, the term "American employer" means an employer which is—

(1) the United States or any instrumentality thereof,

(2) an individual who is a resident of the United States,

(3) a partnership, if two-thirds or more of the partners are residents of the United States,

(4) a trust, if all of the trustees are residents of the United States, or

> (5) a corporation organized under the laws of the United States or of any State.

Internal Revenue Code of 1986, 26 U.S.C. §3401. Definitions.

> (a) Wages For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid—[list of exclusions]
> …
> (c) Employee For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.
> (d) Employer For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—
> …
> (2) in the case of a person paying wages on behalf of a … foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for purposes of subsection (a)) means such person.

Statutes from which §3401(a) of the I.R.C. of 1986 is derived:

The Current Tax Payment Act of 1943, sec. 2(a) (adding new subchapter D to Ch. 9 of the I.R.C. of 1939), Sec. 1621

As used in this subchapter-
(a) The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—[list of exclusions]
…
(c) The term "employee" includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.
(d) The term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person,
except that— …
(2) in the case of a person paying wages on behalf of a … foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for the purposes of subsection (a)) means such person.

Internal Revenue Code of 1986, 26 U.S.C. §6051. Receipts for employees.

(a) Requirement Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been

required to deduct and withhold a tax under section 3402 … or every employer engaged in a trade or business who pays remuneration for services performed by an employee, including the cash value of such remuneration paid in any medium other than cash, shall furnish to each such employee in respect of the remuneration paid by such person to such employee during the calendar year, on or before January 31 of the succeeding year, … a written statement showing the following: …

(3) the total amount of wages as defined in section 3401(a),

…

(5) the total amount of wages as defined in section 3121(a), …

26 U.S.C. §6201. Assessment authority. (Enacted in Taxpayer Bill of Rights 2, Pub.L. 104–168, 110 Stat. 1452, 1463, enacted July 30, 1996).

(d) Required reasonable verification of information returns.

In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and

probative information concerning such deficiency in addition to such information return.

26 U.S.C. §7491. Burden of proof (The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685, enacted July 22, 1998, Sec. 3001)

(a) Burden shifts where taxpayer produces credible evidence

(1) General rule If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

Internal Revenue Code of 1986, 26 U.S.C. §7701. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof – ….

(4) Domestic The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(9) United States The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

(10) State The term "State" shall be construed to include the District of Columbia, where such

construction is necessary to carry out provisions of this title.

[Amendments

1960—Subsec. (a)(9), (10). Pub. L. 86–624, § 18(i), (j), struck out reference to the Territory of Hawaii.

1959—Subsec. (a)(9). Pub. L. 86–70, § 22(g), substituted "the Territory of Hawaii" for "the Territories of Alaska and Hawaii".

Subsec. (a)(10). Pub. L. 86–70, § 22(h), substituted "Territory of Hawaii" for "Territories".]….

Statutes from which §7701(a)(4), (9) and (10) of the I.R.C. of 1986 are derived:

Revenue Act of 1938 (52 Stat. 447, 583), Sec. 901

….(4) The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory….

(10) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Internal Revenue Code of 1939 (enacted as Revised Statutes of 1873, Sec. 3140)

….(10) The word "State" shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out provisions of this title.

Internal Revenue Code of 1986, §7701. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—....

(26) Trade or business The term "trade or business" includes the performance of the functions of a public office.

Statutes from which 26 U.S.C. §7701(a)(26) is derived:

Internal Revenue Code of 1939, Sec. 48

When used in this chapter—....

(d) Trade or business The term "trade or business" includes the performance of the functions of a public office.

26 U.S.C. §7701(c) (enacted in Revenue Act of 1924, 68th Cong. Sess I, Ch. 234, 1924, Sec. 2(b))

The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

REGULATIONS

26 C.F.R. §601.106(f)(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....