

AN INTRODUCTORY BRIEF REGARDING THE TRUTH ABOUT THE TAX

I respectfully request that the Court take judicial notice of the following:¹

1. The U.S. Constitution is the supreme law of the land.²
2. Article 1, Section 9 of the U.S. Constitution prohibits “capitations and other direct taxes” other than by the mechanism of apportionment.³
3. “Capitations” are taxes on persons, and include taxes measured by revenue.⁴

¹ Federal Rules of Evidence Rule 201(d) When mandatory: “A court shall take judicial notice if requested by a party and supplied with the necessary information.”

² United States Constitution, Article VI

³ *Id.*, 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.”

⁴ “...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 the 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,”... “Capitation taxes, if it is attempted to proportion them to the fortune or revenue of each contributor, become altogether arbitrary. The state of a man’s fortune varies from day to day, and without an inquisition more intolerable than any tax, and renewed at least once every year, can only be guessed at.”... “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.”... “In the capitation which has been levied in France without any interruption since the beginning of the present century, the highest orders of people are rated according to their rank by an invariable tariff; the lower orders of people, according to what is supposed to be their fortune, by an assessment which varies from year to year.

...

Several of those who in the first poll-tax [one denomination of “capitation”] were rated according to their supposed fortune were afterwards rated according to their rank. Serjeants, attorneys, and proctors at law, who in the first poll-tax were assessed at three shillings in the

4. The apparatus or denomination of the tax or its implementation is irrelevant. If a tax effectively imposes a liability (falls on) a person, it is a capitation, even if the apparatus or denomination of the tax or its implementation deems it otherwise, such as by purporting it to be a tax on an activity (activity or event), rather than the person connected with that activity. Substance rules over form.⁵

5. A tax effectively on the exercise of a Right is inherently direct, and a capitation.⁶

pound of their supposed income, were afterwards assessed as gentlemen.” Adam Smith, *The Wealth of Nations*, Book V, CH. II, Art. IV (Bear in mind that Smith is using the common words ‘income’ and ‘wages’, not the custom-defined legal terms found in or relevant to the modern federal revenue laws.)

CAPITATION: a tax or imposition raised on each person in consideration of his labour, industry, office, rank, etc. It is a very ancient kind of tribute, and answers to what the Latins called *tributum*, by which taxes on persons are distinguished from taxes on merchandize [sic], called *vectigalia*. J.J.S. Wharton, Esq., *Law Lexicon or Dictionary of Jurisprudence* (1848);

“CAPITATION, A poll tax; an imposition which is yearly laid on each person according to his estate and ability. 2. The Constitution of the United States provides that “no capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration, therein before directed to be taken.” Art. 1, s. 9, n. 4. See 3 Dall. 171; 5 Wheat 317.” Bouvier’s *Law Dictionary*, 6th Ed. (1856)

⁵ “[T]axation on income [is] 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 [that is, any pretense by which it is made to appear that the tax is being confined to its proper limits when it is not, such as by creatively construing the meaning of “income”, or the use of any pretense, scheme or construction by which non-specialized revenue or activities are made to appear otherwise so as to be subjected to the tax] and consider substance alone [that is, what the tax is actually falling upon as a practical reality], and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.” *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916);

“The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents...” *Dawson v. Kentucky Distillers & Warehouse Co.*, 255 U.S. 288 (1921)

⁶ “Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights;”

6. In order for a tax to fall on any person, and yet not be a capitation and subject to apportionment, it must be limited in application, by taxing only activities connected with the exercise of privilege, and not the exercise of Rights.⁷

7. All of the above remains true today, the Sixteenth Amendment notwithstanding.⁸

Knowlton v. Moore, 178 U.S. 41 (1900)

⁷ *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916);

“It is elementary law that every statute is to be read in the light of the constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach.” *McCullough v. Com. of Virginia*, 172 U.S. 102 (1898);

“The income tax is, therefore, not a tax on income as such. It 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.” United States Treasury Department legislative draftsman F. Morse Hubbard, House Congressional Record, March 27, 1943, page 2580;

“[T]he requirement to pay [excise] taxes involves the exercise of privilege.” *Flint vs. Stone Tracy Co.* 220 U.S. 107 (1911);

“The terms ‘excise tax’ and ‘privilege tax’ are synonymous. The two are often used interchangeably.” *American Airways v. Wallace*, 57 F.2d 877, 880 (Dist. Ct., M.D. Tenn., 1937);

“...in *Springer v. U. S.*, 102 U.S. 586, it was held that a tax upon gains, profits, and income was an excise or duty, and not a direct tax, within the meaning of the constitution, and that its imposition was not, therefore, unconstitutional.” *Pollock v. Farmer's Loan & Trust*, 158 U.S. 601, 1895;

“An excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and which embraces every form of burden not laid directly upon persons or property. The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking. * * * The term "excise tax" is synonymous with "privilege tax" and the two are 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.” 71 Am. Jur.2d § 24, pp. 319-20;

“The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed...” *United States v. County of Allegheny*, 322 US 174 (1944).

⁸ “We are of opinion, however, that the confusion is not inherent, but rather arises from the

8. The federal income tax (the tax) effectively falls on persons and is not apportioned.⁹

9. In order for the tax to fall on persons without apportionment, its application must be confined to distinguished activities connected with the exercise of privilege (taxable activities), and not general activities connected with 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..." and, "[If the 16th Amendment were construed to allow for a direct, unapportioned tax, it] 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." *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916);

"The provisions of the Sixteenth Amendment conferred no new power of taxation..." *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916);

"The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects..." *Peck v. Lowe*, 247 U.S. 165 (1918);

"[T]he settled doctrine is that the Sixteenth 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." *Taft v. Bowers*, 278 US 470, 481 (1929);

"The legislative history merely shows... ..that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable." *South Carolina v. Baker*, 485 U.S. 505;

"*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...*" Howard M. Zaritsky, Legislative Attorney of the American Law Division of the Library of Congress, helpfully summarizes all of this in his 1979 Report NO. 80-19A entitled "*Some Constitutional Questions Regarding The Federal Income Tax Laws*";

"[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 with respect to the privilege of carrying on any activity or owning any property which produces income," (that is, "income otherwise taxable", as the Supreme Court reminds us some four-and-a-half decades later in the *South Carolina v. Baker* decision.) United States Treasury Department legislative draftsman F. Morse Hubbard, House Congressional Record, March 27, 1943, page 2580

⁹ 26 USC §1

exercise of Rights.¹⁰

10. Because the tax must be confined to distinguished activities (or be unconstitutional for being an unapportioned capitation), those who would impose the tax bear the burden of proving that the activities for which liability is said to have arisen are so distinguished, if this presumption or assertion is disputed.¹¹

11. Americans such as ourselves, Peter and Doreen Hendrickson, are shielded from non-apportioned capitations and other direct taxes by Article 1, Section 9 of the U.S. Constitution.¹²

12. Working and being paid for doing so, or acquiring wealth in any other fashion, absent specialized circumstances, are the exercise of Rights, not privilege.¹³

¹⁰ Points 1 - 7 with associated footnotes.

¹¹ “Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, **once the party invoking the presumption establishes the basic facts giving rise to it.**” Notes of Advisory Committee to Federal Rules of Evidence Rule 301 (emphasis added.)

¹² United States Constitution Article 1, Section 9; Article VI.

¹³ “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’.” *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);

“An income tax is neither a property tax nor a tax on occupations of common right, but is an excise tax...The legislature may declare as ‘privileged’ and tax as such for state revenue, those

13. In order for a court to acquire or maintain jurisdiction in a lawsuit in which the federal government alleges a claim to a non-apportioned tax from persons such as ourselves, or for a court to find that liability for such a tax falls on us, the government must prove that we were engaged in taxable activities-- and to the extent alleged-- once we have rebutted allegations and presumptions to this effect.¹⁴

14. The conduct of taxable activities is measured by the dollar amount received as a consequence of the conduct.¹⁵

15. Allegations reporting amounts paid to others on “information returns” such as W-2s and 1099s are allegations of the conduct of taxable activities by

pursuits not matters of common right, but it has no power to declare as a 'privilege' and tax for revenue purposes, occupations that are of common right.” *Simms v. Ahrens*, 271 SW 720 (1925); “Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as privilege.” *Jack Cole Company v. Alfred T. MacFarland, Commissioner*, 206 Tenn. 694, 337 S.W.2d 453 Supreme Court of Tennessee (1960).

¹⁴ All of the foregoing, and: “[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective. Under Rule 12(h)(3) the Court is directed to dismiss an action when it appears the Court lacks jurisdiction over the subject matter,” and, “The failure to prove jurisdictional facts when specifically denied is fatal to the maintenance of this action.”

United States v. One 1972 Cadillac, 355 F.Supp. 513, 514-15 (E.D.Ky.1973). See also *United States v. Isaac*, 968 F.2d 1216 (6th Cir. 1992);

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see *Willy v. Coastal Corp.*, 503 U.S. , (1992) (slip op., at 4-5); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. President of Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).” *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994).

¹⁵ “The income tax... ..is an excise tax with respect to certain activities and privileges which is measured by reference to the [earnings] which they produce.” United States Treasury Department legislative draftsman F. Morse Hubbard, House Congressional Record, March 27, 1943, page 2580

others, not allegations of the payment or receipt of money per se, which has no relevance to the tax, since the payment or receipt of money is not, by itself, taxable. Instead, the allegations on “information returns” are allegations of the conduct of taxable activities under various protocols and labels specified within the tax law,¹⁶ the extent of which is alleged by the dollar amounts reported.¹⁷

16. When an allegation of the conduct of a taxable activity has been made by reporting an amount paid, using forms specified for the reporting of amounts connected with taxable activities (such as forms W-2 and 1099), a counter-report of the receipt of a different amount, made in the same context and by use of the same or similar forms, is a denial of the reported amount of conduct of a taxable activity.¹⁸

¹⁶ See, for example, 26 USC §§ 6041, 6051

¹⁷ Hubbard.

¹⁸ “And be it further enacted,...that any party, in his or her own behalf,...shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the Commissioner of Internal Revenue,... ..the amount of his or her annual income,... liable to be assessed,... and the same so declared shall be received as the sum upon which duties are to be assessed and collected.” *Section 93 of The Revenue Act of 1862*;

Senator Danaher: *"Of course, you withhold not only from taxpayers but nontaxpayers."*

Mr. Hardy: *"Yes."*

...

Senator Danaher: *"I have only one other thought on that point. In the event of withholding from the owner of stock and no taxes due ultimately, where does he get his refund?"*

Mr. Friedman: *"You're thinking of a corporation or an individual?"*

Senator Danaher: *"I am talking about an individual."*

Mr. Friedman: *"An individual will file an income tax return, and that income tax return will constitute an automatic claim for refund."*

From a hearing before a subcommittee of the committee on finance, United States Senate, during the 77th Congress, Second Session on withholding provisions of the 1942 Revenue Act on August 21 and 22, 1942. Connecticut Republican Senator John A. Danaher and testifying witnesses Charles O. Hardy of the Brookings Institution and Milton Friedman of the Treasury

Further,

17. The means or manner by which an allegation is denied cannot be construed to be a confirmation of the allegation.¹⁹

18. Allegations of the conduct of taxable activities, such as are made on “information returns” like “Forms W-2” or “Forms 1099” or by any other means, are not proof of themselves, but must be supported by additional fact evidence, if those allegations have been denied.²⁰

19. A plaintiff in any action is required to furnish evidence to support the allegations on which its complaint is based in order to maintain a court’s jurisdiction and the viability of its action, and a failure to do so when those allegations have been denied deprives the court of jurisdiction and is fatal to the plaintiff’s action.²¹

20. In addition to the general and routine obligations of a plaintiff to furnish evidence to support the allegations on which its complaint is based in order to maintain a court’s jurisdiction and the viability of its action, the United States is

Department Division of Tax Research.

¹⁹ Federal Rules of Civil Procedure Rule 8(e) Construing Pleadings: “Pleadings must be construed so as to do justice.”

²⁰ “[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective,” and “The failure to prove jurisdictional facts when specifically denied is fatal to the maintenance of this action.” *United States v. One 1972 Cadillac*, 355 F.Supp. 513, 514-15 (E.D.Ky.1973). See also *United States v. Isaac*, 968 F.2d 1216 (6th Cir. 1992); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994) and cases cited.

²¹ *United States v. One 1972 Cadillac*, 355 F.Supp. 513, 514-15 (E.D.Ky.1973). See also *United States v. Isaac*, 968 F.2d 1216 (6th Cir. 1992); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994) and cases cited.

explicitly required by statute to support disputed reports of the conduct of taxable activity made on “information returns” with additional fact evidence in ANY court proceeding.²²

21. A failure by the United States to support disputed “information return” allegations with additional fact evidence is, BY STATUTE, a “failure to prove jurisdictional facts”, and therefore is, ab initio, “fatal to the maintenance of this action” in ANY court proceeding.²³

²² See 26 USC §§6201(d) and 7491, and, “[T]he Commissioner's determination that Portillo had received unreported income of \$24,505 from Navarro was arbitrary. The Commissioner's determination was based solely on a Form 1099 Navarro sent to the I.R.S. indicating that he paid Portillo \$24,505 more than Portillo had reported on his return. The Commissioner merely matched Navarro's Form 1099 with Portillo's Form 1040 and arbitrarily decided to attribute veracity to Navarro and assume that Portillo's Form 1040 was false.” *Portillo v. CIR*, 932 F.2d 1128 (5th Cir., 1991);

“Receipt of a Form 1099 does not conclusively establish that the recipient has reportable income. If a recipient of a Form 1099 has a reasonable dispute with the amount reported on a Form 1099, the Code places the burden on the Secretary of the Treasury to produce reasonable and probative information, in addition to the Form 1099, before payments reported on a Form 1099 are attributed to the recipient. See I.R.C. § 6201(d).” *Mason v. Barnhart*, 406 F.3d 962 (8th Cir., 2005);

“If, however, the “taxpayer introduces credible evidence with respect to any factual issue,” see 26 U.S.C. § 7491(a)(1), and also meets substantiation and record maintenance requirements, see *id.* [*11] § 7491(a)(2)(A)-(B), the burden shifts to the Commissioner with respect to that issue. “Credible evidence,” as used in § 7491(a)(1), means “the quality of evidence, which after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted.” *Blodgett v. Comm'r*, 394 F.3d 1030, 1035 (8th Cir. 2005)” *Rendall v. CIR*, 535 F.3d 1221 (10th Circ., 2008) and cases cited;

“In summary, businesses can make mistakes in reporting data on information returns, and, decisive here, respondent offered no evidence showing that the amounts on the 2004 Form 1099-R are correct. We conclude respondent has not met his burden of producing reasonable and probative information...”*Perez v. CIR*, T.C. Summary Opinion 2009-94

²³ *United States v. One 1972 Cadillac*, 355 F.Supp. 513, 514-15 (E.D.Ky.1973). See also *United States v. Isaac*, 968 F.2d 1216 (6th Cir. 1992); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994) and cases cited.

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-Peter E. Hendrickson

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