1/10/05

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WE THE PEOPLE FOUNDATION INC., et al.,

Plaintiffs,

v.

No. 104-cv-01221 EGS

UNITED STATES, et al.,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR REPLY

Plaintiffs, Robert L. Schulz, *pro se,* respectfully moves the Court for the entry of an order granting leave of the court to file a Sur-Reply, if any, on or before February 1, 2005.

In support of this request, Plaintiff avers that in Defendants' Reply Brief, Defendants have made a fresh start in arguing for the Court's dismissal of the complaint. Defendants' Reply Brief contains significant, material allegations and arguments that Plaintiffs (and the Court) have not seen before. Consequently, unless Plaintiff is granted an opportunity to submit a Sur-Reply, Plaintiff will have been deprived of an opportunity to oppose Defendant's new allegations and arguments and justice will not have been served.

One example of Defendants' fresh start is Defendants' shift away from their primary argument that "Nothing in the Constitution requires government to 'listen or

respond' to Plaintiffs' four Petitions for Redress of Grievances," as argued in Defendants' Motion to Dismiss, to an entirely new argument, to wit, " Government HAS responded to Plaintiffs, but nothing in the Constitution requires the government to 'adequately respond.'" Apparently, Plaintiffs were so effective in opposing the first claim that Defendants were forced to begin anew in their Reply.

In their Reply, Defendants now allege that they have responded to one of Plaintiffs' four Petitions for Redress. Defendants argue that, "members of all three branches have already responded to 'anti-tax' arguments identical to those raised by plaintiffs....See The Truth About Frivolous Tax Arguments, IRS Pub. No. 2105 (Rev. 10-2003)...." [1]

In fact, this is a false statement that could only have been deliberate. The Truth About Frivolous Tax Arguments **does not have any Pub. No**. It has no catalog number. It doesn't even have a cover! It has no Treasury Department or IRS logo or seal. There is no publication date or indication of who wrote it or which department of the government is responsible for it. It has no designated author. In fact, The Truth About Frivolous Tax Arguments is not an official government document. It consists of 54 pages of unofficial propaganda, nothing more.

In fact, "IRS Pub. No. 2105 (Rev. 12-2003)" is an official, one-page, tri-folded brochure titled, "Why do I have to Pay TAXES [sic]?"

In fact, even if it was an official document (which is not the case), The Truth About Frivolous Tax Arguments does not respond to any of the questions Plaintiffs have presented to the government in their Petition for Redress of Grievances regarding the

[1] Plaintiff objects to Defendants' attempt to bias the Court by referring to Plaintiffs' Petitions for Redress as mere "anti-tax" arguments and as mere "correspondence." Plaintiffs are not anti-tax, anti-war, anti-central bank or anti-police powers. Plaintiffs are pro-constitution.

government's apparent violation of the tax clauses of the Constitution. Compare, for instance, statements found in The Truth About Frivolous Tax Arguments with Plaintiff's questions regarding the constitutionality of the direct, un-apportioned tax on labor, which were included in Plaintiffs' May 5, 2004 Petition for Redress that was served on the highest ranking Treasury officials in the Executive branch, including the President. The following is all that is said about the subject in The Truth About Frivolous Tax Arguments (page 26):

> **"Some assert that the Sixteenth Amendment does not authorize a direct non-apportioned income tax and thus, U.S. citizens and residents are not subject to federal income tax laws.**
>
> **"The Law: The courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid. In United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990), cert. denied, 500 U.S. 920 (1991), the court cited to Brushaber v. Union Pac. R.R., 240 U.S. 1, 12-19 (1916), and noted that the U.S. Supreme Court has recognized that the Asixteenth amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation."**

This statement is absolutely false and utterly fails to answer any of the questions Plaintiffs have included in their repeated Petitions for Redress of Grievances regarding the direct, un-apportioned tax on labor, including the questions presented below (at the end of this motion), questions that were included, word for word in Plaintiff's May 5, 2004 Petition to the government 5, 2004 Petition to the government for Redress of Grievances (See, paragraph 77 and 78 of Affidavit to this Court, sworn to by Plaintiff Schulz on September 16, 2004, with Exhibits HHH, III, JJJ and KKK):

This is only one of many material issues of fact that arise out of Defendants' Reply brief, that Plaintiff respectfully requests the opportunity to respond to. For instance, Defendants also allege for the first time (footnote 4 on page 5), that the

Legislative branch (Senate Finance Committee) has responded to Plaintiffs' grievances relating to the taxing clauses. This is certainly not true. See for instance paragraphs 20-27 of the affidavit to this Court, sworn to by Plaintiff Schulz on September 16, 2004, with Exhibits. Defendants also allege for the first time that the Judicial branch (2d and 7th Circuits) has responded to Plaintiffs' Grievances. This is not true either.

Many of Defendants' allegations and arguments in their Reply were not included in Defendants' Motion to Dismiss. Rather than a reply to Plaintiffs' Opposition, Defendants' reply brief is more like a memorandum in support of a motion to dismiss, presenting for the first time, material allegations and arguments. It is anticipated that Plaintiff will be able to fully reply in opposition to the motion to dismiss by February 1, 2005.

Certificate of Counsel pursuant to L.Civ.R. 7.1(m). Plaintiff Schulz spoke with counsel for the defendants on January 10, 2005, explaining the reason for the anticipated motion in a good faith effort to determine whether he would oppose the motion and in order to include in motion a statement that the discussion occurred and to represent to the court the response of defendants' counsel. Counsel for the defendants said he would oppose the motion. Counsel for the remaining Plaintiffs said he supports this motion.

What follow are, word for word, the questions regarding the Constitutionality of Defendants' enforcement of a direct, un-apportioned tax on labor, which questions Plaintiffs have included in their Petition for Redress. Defendants have long-refused to answer any one of these questions and certainly do not do so in The Truth About Frivolous Tax Arguments . It is a fraud on the Court for Defendants to tell the Court The Truth About Frivolous Tax Arguments has an IRS Publication Number when it does not

have any number at all, government or otherwise, official or otherwise, and to tell the court that through The Truth About Frivolous Tax Arguments the Executive branch has responded to the identical questions that Plaintiffs have raised in our Petition for Redress when it does not respond to any of Plaintiffs Petition questions.

17. Admit or deny that labor is property.

In the case of *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1883), Supreme Court Justice Field wrote in his concurring opinion at page 757:

"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.'"

18. Admit or deny that a tax on property is a direct tax.

19. Admit or deny that the executive branch of government must follow the intent of the legislative branch which must itself conform to the intent of the Constitution.

"It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn. The first alternative was rejected. All difficulties of construction vanish if we are willing to give to the words, deliberately adopted, their natural meaning." U.S. v. Pfitsch, 256 U.S. 547, 552 (1921).

20. Admit or deny that the Senate considered and rejected including un-apportioned direct taxation within the authority of the Sixteenth Amendment.

The evidence that direct taxes are without the authority of the Sixteenth Amendment is overwhelmingly compelling. The Senate voted on the Sixteenth Amendment (S.J.R. #40) at 1 o'clock on July 5, 1909. Senator Aldrich had earlier tried to ram it through the Senate on Saturday, July 3rd, a holiday weekend, for an immediate vote without debate when only 52 senators were present. A few senators protested and the vote was set for the following Monday. During the debate on July 3rd, several amendments were proposed to S.J.R. #40 that came up for a vote at the appointed hour of 1 PM Monday, July 5, 1909.

There also was an amendment by Senator McLaurin of Mississippi. After a long discussion by him about direct taxes, Senator McLaurin proposed this amendment to S.J.R. #40 as follows:

"The SECRETARY. Amend the joint resolution by striking out all after line 7 and inserting the following: The words 'and direct taxes' in clause 3, section 2, Article I, and the words 'or other direct,' in clause 4, section 9, Article I. of the Constitution of the United States are hereby stricken out." 44 Cong. Rec. 4109 (1909).

The Senate rejected this, as this amendment failed by voice vote. Had it passed, it would have provided authority for a species of income tax that was inherently a direct tax to be levied without apportionment.

Lastly there was an amendment by Senator Bristow of Kansas to replace S.J.R. #40 with S.J.R. #39. S.J.R. #39 read:

"The Congress shall have the power to lay and collect direct taxes on incomes without apportionment among the several States according to population." id. At 4120-1.

This substitute amendment also included a provision to elect senators by popular vote. After some debate this was also rejected by voice vote. The election of Senators by popular vote was soon thereafter approved by the 17th Amendment. Therefore this instant amendment failed because of the direct tax provision.

21. Admit or deny that in the Brushaber Case, 240 U.S. 1 (1916), both Brushaber and the government argued that the Sixteenth Amendment provided for an exception to the apportionment rule such that a direct tax could be collected without apportionment.

This issue was presented squarely to the Supreme Court in the following cases: Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916); Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916); Thorne v. Anderson, October term 1915, No.394 (24,613); Dodge v. Osborn, 240 U.S. 118 (1916); and Stanton v. Baltic Mining Co., 240 U.S. 103 (1916). Mr. Brushaber, Tyee Realty Co. and Mr. Thorne all had the same attorney, a Mr. Julian Davies from New York City of the law firm Davies, Tolles, Glenn and Schurick. Mr. Davies asserted in his brief in each of these cases as follows:

"The effect of the Sixteenth Amendment was merely to waive the requirement of apportionment among the States, in its application to a general and uniform tax upon incomes from whatever source derived...

"The evident purpose of this amendment was not to abandon the former policy of safeguarding the several sections of the Union against disproportionate taxation, but merely to substitute an apportionment according to incomes 'from whatever source derived,' in lieu of a per capita apportionment." Br.for appellant at 9-11, Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916).

In other words, according to Brushaber, the income tax was still a direct tax. Only the criteria for apportionment changed. Apportionment was now alleged to be based on incomes instead of the per capita apportionment originally required by the Constitution. In its amicus curae brief, the government argued a similar position:

"(b) Apportionment being restricted to direct taxes only (Flint v. Stone Tracy Co., supra 152), the Sixteenth Amendment, in removing that restriction, recognized any tax upon income 'from whatever source derived' as a direct tax, and as such subject to the apportionment rule unless specially exempted." Br. for the United States at 11-12, Brushaber v. Union Pac. R.R. Co., supra.

22. Admit or deny that the Supreme Court rejected arguments that the Sixteenth Amendment provided authority for an un-apportioned direct tax within the several States.

The Supreme Court stated in its opinion in the Brushaber Case:

"[t]he contention that the Amendment treats a tax on income as a direct tax, although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, **is also wholly without foundation**..." Brushaber v. Union Pac. R.R. Co., supra at 18.

Buttressing the conclusion that the Sixteenth Amendment does not provide authority for an un-apportioned direct tax on the labor of an American Citizen living and working in the several States, we go to Harvard Law Review's commentary on the Brushaber Case:

"In Brushaber v. Union Pac. R.R. Co., Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is 'indirect,' rather than as making an exception to the rule that direct taxes must be apportioned." The Income Tax and the Sixteenth Amendment, 29 Harvard Law Review 536 (1915-6).

Cornell Law Quarterly simplifies what this Court said in Brushaber:

"The contention of the appellant was as follows:

(1) The Sixteenth Amendment provided for a new kind of a direct tax, a tax on incomes from whatever source derived.

The court, through Chief Justice White, held that the tax [in Brushaber] was constitutional. The major proposition of the appellant's argument is not true. Hence, the conclusion does not follow. The sixteenth amendment [sic] does

not permit a direct tax, (in fact as it will later be shown, the court does not think that the amendment treated the tax as a direct tax at all), carrying with it the distinguishing characteristic of a hitherto unrecognized uniformity.

The amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong." Ramon Siaca, The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment, 1 Cornell Law Quarterly 298, 299 and 301 (1916).

Said another way, the theory upon which the Pollock Case was decided was overturned by the Sixteenth Amendment. See also Constitutional Law: Income Tax: Sixteenth Amendment, 4 California Law Review 333, 335-6 (1915-6), and Washington Notes, The Income Tax Decision, 24 The Journal of Political Economy 299, 300 (1916).

In 1916, the New York Times wrote of the Brushaber Case:

"The basic error of those who attacked the constitutionality of the tax, Chief Justice White holds... was in regarding the Sixteenth Amendment as empowering the United States to levy a direct tax without apportionment among the States according to population. In substance, the court holds that the Sixteenth Amendment did not empower the Federal Government to levy a new tax...

We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth 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." Income Tax Upheld In Broad Decision, N.Y. Times, p. 5, January 25, 1916.

"The Supreme Court has held that the sixteenth amendment did not extend the taxing power of the United States to new or excepted subjects but merely removed the necessity which might otherwise exist for an apportionment among the States of taxes laid on income whether it be derived from one source or another. So the amendment made it possible to bring investment income within the scope of a 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. 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." Congressional Record – House, March 27, 1943,page 2580.

23. Admit or deny that there is no evidence that can be found anywhere upon which the government can rely in claiming that Congress intended to use the Sixteenth Amendment to create an exception to the apportionment rule whereby a direct tax could be levied without apportionment.

24. Admit or deny that the purpose of the Sixteenth Amendment was to bring tax relief to wage earners.

25. Admit or deny that the 16th Amendment created no new classification of taxes under the Constitution, and we are therefore still left only with direct and indirect taxes.

26. Admit or deny that the 16th Amendment provides taxation authority only for income taxes that are inherently indirect and that such taxes must be levied according to the constitutional rule of uniformity.

27. Admit or deny that the 16th Amendment does not provide an exception to the constitutional rule of apportionment for direct taxes.

28. Admit or deny that any tax on wages and salaries is inherently a direct tax outside the scope of the 16th Amendment, and therefore, EVEN IF wages & salaries were constitutionally valid subjects for direct taxation, that a tax upon such subjects would be required to be apportioned among the several States according to population.

29. Admit or deny that taxes on wages and salaries are direct taxes and must be apportioned among the several States.

30. Admit or deny that the current tax on the wages of ordinary Americans is an un-apportioned direct tax.

31. Admit or deny that the Supreme Court, in *Brushaber v Union Pac. R.R. Co.*, 240 U.S. 1 (1916), rejected the idea that the 16th Amendment granted to government the power to impose an un-apportioned direct tax, such as the current tax on wages.

32. Admit or deny that the Supreme Court, in *Brushaber v Union Pac. R.R. Co.*, 240 U.S. 1 (1916), ruled that any contention that the 16th Amendment treats a tax on income as a direct tax is wholly without foundation.

33. Admit or deny that generically an income tax has been classed as an excise by the Supreme Court in *Brushaber v Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

34. Admit or deny that the Supreme Court, in *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916), ruled that 16th Amendment did not confer a new power of taxation, as would be a power to impose an un-apportioned direct tax on the wages of ordinary Americans, it merely prohibited the complete and plenary power to tax income derived from labor or capital from being taken out of the category of un-apportioned indirect taxation to which it inherently belonged.

35. Admit or deny that an income tax on the severable net income from business or accumulated wealth is an indirect tax and a tax on the earned income from wages and salaries is a direct tax, and that the government is wholly without power to collect the latter from ordinary American citizens without apportionment.

36. Admit or deny that the Senate, in voting on the 16th Amendment resolution, unambiguously expressed the intent of Congress to reject the idea of an un-apportioned direct tax on wages by repeatedly rejecting the opportunity to bring direct taxes within the scope of the 16th Amendment, and that it is well settled by the Supreme Court that if Congress has directly spoken to the precise question at issue, the intent of Congress is clear and that ends the matter.

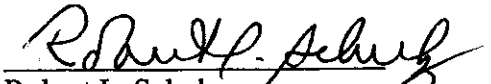
37. Admit or deny that one more than one half of the federal Appeals courts have ruled that the current tax on wages of ordinary Americans is an un-apportioned direct tax while the remaining Appeals courts have ruled the same tax to be an un-apportioned indirect tax.

38. Admit or deny that the income tax of the 16th Amendment is a tax that diminishes the income that flows from the source, leaving the source of the income undiminished.

Accordingly, Plaintiff respectfully requests that the Court grant the motion for leave to file a sur-reply, if any, on or before February 1, 2005.

Dated: January 10, 2005

Respectfully submitted,



Robert L. Schulz, *pro se*
2458 Ridge Road
Queensbury, NY 12804
(518) 656-3578