Liberty Tree

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LET'S BE FRANK

The *Brushaber* Decision, Part VI

By Dick Greb

THE EVOLUTION OF "INCOME"

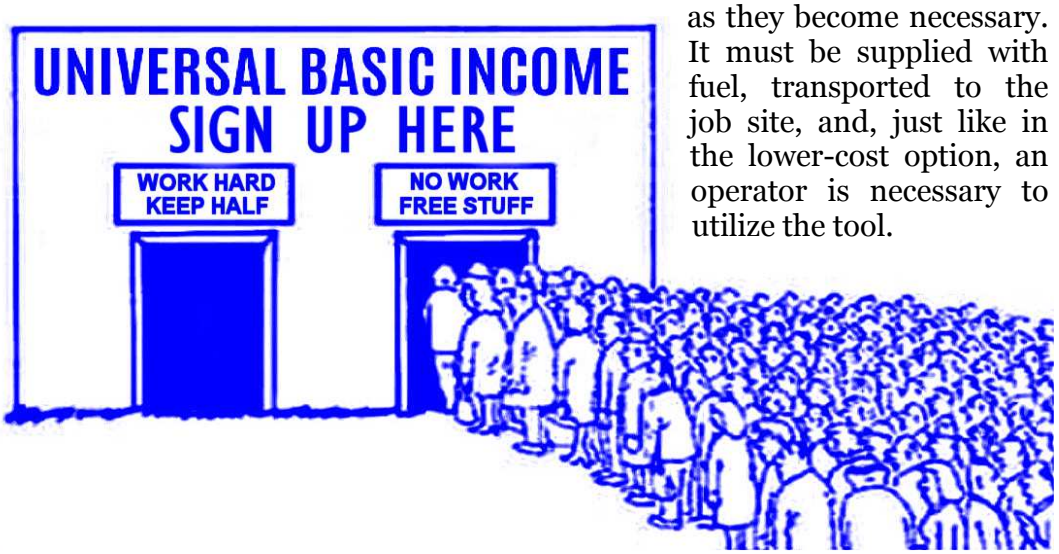
In our current series, we've been looking into the decision from the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*,[1] written by Chief Justice Edward White. To be sure, the last installment made only minor progress in the opinion itself, because of a comment White made which led me to a discussion of *income*, and the significance of that term being used in the 16th Amendment. We saw that due to its appearance therein, coupled with the fact that Congress cannot alter the Constitution by mere legislative fiat, *income* acquired a permanent definition. The Supreme Court, in *Eisner v. Macomber*, clearly laid out that definition for us:

> '***Income may be defined as the gain*** derived from capital, from labor, or from both combined,' provided it be understood ***to include profit*** gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case.[2]

Thus, we see that *income* is simply *gain* or *profit*. Therefore, when §61(a) of the Internal Revenue Code tells you that "'*gross income*' means *all income* from whatever source derived," you know to substitute "all profit" in place of "all income." And since 'gross income' is the starting point for all income tax calculations, it's important that you first distinguish between your *receipts* (all that comes in) and the *profits* (receipts *minus expenses*) you derive therefrom (that is, your *income*), a distinction the Internal Revenue Service does its best to obscure.

If any don't eat, neither can he work

Let's compare the relative situations of an individual and a corporation from a couple of different perspectives. First, let's consider the expenses related to the creation of profit in a ditch-digging business. If a corporation hires a man to dig ditches, that man's wages are an expense to the company, as well as the cost of any tools he must use to perform the work. The low-tech option of picks and shovels would certainly help keep expenses low, but using human power to dig ditches may not be as productive as mechanical power. Therefore, rather than the low-tech tool route, the corporation may instead buy a ditch-digging machine to perform the work. Of course, there are considerably more expenses involved with this option, not the least of which is the initial cost of the machine (the *cost basis*). But, that's not all. The machine must be kept somewhere when not in use, preferably out of the weather if it is to be preserved as long as possible. It must be maintained in good working order, through preventive maintenance, as well as restorative repairs as they become necessary. It must be supplied with fuel, transported to the job site, and, just like in the lower-cost option, an operator is necessary to utilize the tool.



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1. 240 U.S. 1 (1916).
2. 252 U.S. 189, 207 (1920).

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Now let's consider the expenses of the individual ditch-digger from that example. It can be readily seen that the expenses of that man in generating the receipts from his digging enterprise (from which his profits are derived) are much the same as the corporation. The biggest difference is that his 'ditch-digging machine' — being a gift to him from God — has no *cost basis*. However, all of the continuing expenses apply to his situation. To preserve his physical well-being, he must protect himself from the elements. Without shelter, his ability to provide the labor necessary to continue to receive his wages will be greatly diminished, and in a rather short time, will be gone entirely. The same goes for the preventive maintenance of his health, as well as restorative procedures should they become necessary, (including the cost of any insurance, being a means to provide for those eventualities). He must have a means to transport himself to his workplace, and the fuel required to do so (which necessarily includes all of the expenses to maintain that 'tool'). And he must provide the fuel for his body itself, in order to keep it running. All of these are necessary expenses to the individual in generating his receipts, and so must properly be accounted for before arriving at his 'profit' or 'gross income.'

> '**Income** may be defined as the **gain** derived from capital, from labor, or from both combined,' provided it be understood to include **profit** gained through a sale or conversion of capital assets.
>
> — *Eisner v. Macomber*

Nothing but the best

Next, let's consider the idea of extravagance. The corporation pays its top executives huge salaries, perhaps many millions of dollars each year. It also builds well-appointed headquarters and factories equipped with the latest technologies. And, of course, such things cost money — big money! But the corporation gets to subtract these expenses from its receipts in calculating the amount of profit they receive from their entire enterprise. And most importantly, it gets to subtract the *actual* expenses it incurs. So, even though it may be *possible* to hire an executive, or build (or occupy) offices and factories, for considerably less money than the ones they chose, it isn't constrained to those lower-cost alternatives.
Likewise for the individual working man. Whether he decides to live in a mansion or a bungalow (or even whether to buy a home or lease one), eats T-bones or ramen noodles, drives a Lexus or a beat-up old Ford, he rightly gets to subtract his *actual* expenses for these things from his receipts to arrive at his profit. Obviously, the man going the extravagant route will be reducing the amount of profit he realizes from his receipts — and thus, ultimately, the amount of 'gross income' upon which his taxes would be calculated, but that is his choice. He is under no legal or moral obligation to arrange his life in the manner which results in the greatest amount of tax revenues for the government. The 2nd Circuit stated this quite plainly in *Helvering v. Gregory*:[3]

> Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

The Supreme Court, when that case went up on appeal, reiterated the principle:

> The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.[4]

Surprise! The government doesn't agree

Now, I wouldn't want you to think that because I've laid this all out here, that I'm implying that the courts of our fair land have concurred in my position on *income* vis-à-vis *wages*. That is most certainly NOT the case, especially at the district and circuit levels. A typical example would be this quote from a 9th Circuit 'tax protestor' case against Robert Romero:

> Compensation for labor or services, paid in the form of wages or salary, ***has been universally, held by the courts of this republic to be income***, subject to the income tax laws currently applicable. We recognize that the tax laws bear heavily on all persons engaged in gainful activity, and ***recognize the right of a taxpayer to minimize his taxes by all lawful means***. But Romero here is not attempting to minimize his taxes; instead he is attempting willfully and intentionally to ***shift his burden to his fellow workers by the use of semantics***. He seems to have been inspired by various tax protesting groups across the land who postulate weird and illogical theories of tax avoidance, all ***to the detriment of the common weal*** and of themselves.[5]

Notice that even though the judge professes to recognize the right of citizens to minimize their tax burdens, he doesn't consider insisting on the proper

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3. 69 F.2d 809, 810 (2d Cir. 1934).
4. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).
5. *United States v. Romero*, 640 F.2d 1014, 1016 (1981).

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definitions of legal terms to be a lawful means of doing so. Romero argued in the case that the "wages" he received from his work as a carpenter did not constitute 'income' as that term is used in the tax law. And, as I've shown above, and despite the universal judicial decisions to the contrary, he is correct, at lease insofar as exact congruence is concerned. That is to say that the two terms are not precisely synonymous, although in certain cases — if there were zero expenses, for example — they could result in an equivalent value.

Sources of profit

The report of Romero's case doesn't specify the rationale for his determination that his wages weren't income, but all too often in the tax movement, the reality gets lost in wishful thinking. There is nothing special about wages that distinguishes them from being income — such as the popular idea that they represent exchanges of equal value, for example. The distinction is that wages are merely a *source* of income, and not the income itself. That is, income — again, *profit* — may be realized as the result of one's receiving wages, but that can't be determined until all the accompanying *expenses* are subtracted from them. In that respect, wages are no different than any of the other sources of income listed in the definition of 'gross income' from the Internal Revenue Code ('IRC'). Let's look first at §22 (a) of the 1939 Code:

> 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. ...

Here, it's easy to see the structure of the definition. It specifically equates 'income' with 'profit,' and then goes on to list various common *sources* from which such profit might originate. The definition enumerates the *profit derived from* "wages ... or dealings in property, ... [or] interest, rent, dividends, ... or the transaction of any business." Clearly then, 'wages' cannot *be* 'income' if 'income' is unequivocally said to *be derived from* 'wages.' Likewise, 'dealings in property" are not 'income,' only the profits derived from such dealings. And of course, the same goes for all the other listed sources — interest, rent, dividends, etc. — they are not the 'income' itself, only the source of possible profit.

Something seems askew

Then, as readers may well know, Congress recodified the IRC in 1954. In doing so, §22(a) of the '39 Code was transformed into §61(a) of the '54 Code:

> **SEC. 61. GROSS INCOME DEFINED.** *(a)* 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, 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.

The observant reader will notice that some changes have been made to the language used. Many people seem to pick up on the fact that 'wages' and 'salaries' are no longer specifically mentioned,[6] but pass over the removal of the synonyms which served to clarify the term 'income' — that is, the terms 'gains' and 'profits.' Without those clarifying terms, 'income' starts taking on a different shade of meaning. It starts to seem more like "that which comes in" — or 'receipts', rather than 'profits.' And indeed, the other alterations show that this trickery was not by accident.

We can begin to see this by first comparing the new items (2) and (3) with their counterparts from the earlier statute. As noted before, "the transaction of any business" was put in the same relation as "interest," "rent," and "dividends" in 1939. That is, all

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6. It is sometimes argued, wrongly in my opinion, that removing the terms was meant to manifest an intent not to tax wages and salaries. I think it rather obvious that those two terms were simply consolidated into "compensation for services."

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were listed as *sources* of gain. But, after the change, the former became "gross income derived from business." In other words, this list item is no longer a 'source,' but now it's *'income' from that specific source*. The same goes for the previous source listed as "dealings in property;" now the statute specifies the "gains from dealing in property," confirming that it too has now become an item of 'income' from that particular source, rather than just a listed source.

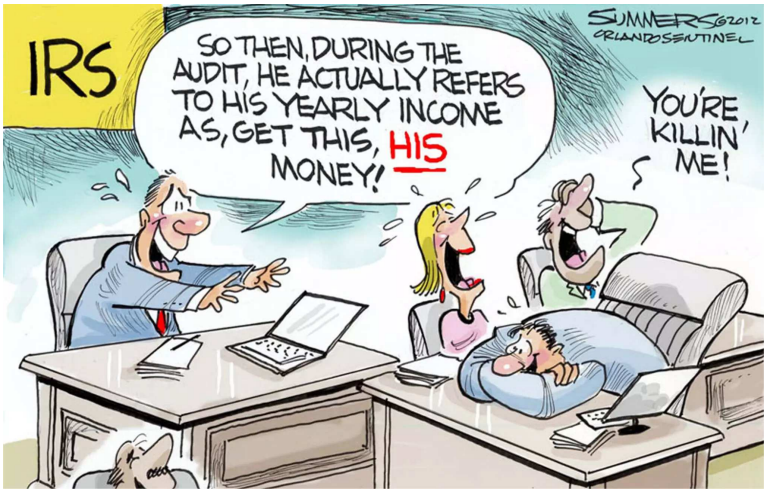
For those two items, however, the alterations are little more than semantics.[7] The real fraud comes into play with the rest of the original list. As I said, the new list still keeps the same relationship between interest, rent, and dividends and the two we just discussed, but the new list is one of *items of income* rather than *sources of possible profit*! Therefore, whereas §22 defined 'gross income' as including the "profits … derived from … interest, rent, dividends," §61 defines it as including "(4) Interest; (5) Rents; … (7) Dividends," not merely the profits derived from them. And most important to the working men and women among us, that's what they did to our paychecks. The new law now said "compensation for services" was income, instead of merely a source of it.

Of course, we need to remember what the Supremes said in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920):

> ***Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution***, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

In other words, Congress violated the Constitution when they pretended to adopt a new definition of 'income' by statute. And as the Supremes further said back in 1886:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; ***it is, in legal contemplation, as inoperative as though it had never been passed***.[8]



This cartoon showing the IRS' attitude toward the public also demonstrates the widely held, government-approved, yet unconstitutional definition of income as all funds acquired.

What could have been

I think it should be mentioned here that had it wanted, Congress could have easily modernized the language of §22 while keeping the exact meaning intact. If instead of "including (but not limited to) the following items," it had prefaced the list with "including (but not limited to) the ***gains, profits, and income derived from*** the following items," the illegal attempt to amend the Constitution outside the amendment process would have been avoided. Could it have just been an inadvertent oversight? In the next installment, we'll take a look at some documents that may shed some light on the matter. Stay tuned!

WHAT CAN SAVE-A-PATRIOT DO?

Members and others who hear about the Fellowship ask us: What can Save-A-Patriot DO for me? **And the answer is — more than you might imagine.**

In fact, Save A Patriot Fellowship stands ready to assist with any state or local taxing problems, citations, tickets, licensing issues — any area where state or local government bureaucrats are interfering with patriots' freedoms or misapplying the law, and where legal research could help clarify the situation. SAPF is also willing to assist with federal matters other than IRS income tax issues, and can help with Freedom of Information Act requests and Privacy Act Requests for information (even from the IRS disclosure office).

Finally, SAPF has years of experience with IRS policies and procedures, and can help you *understand* the methods of the IRS. So please call with your questions and problems. We *are here* to help save patriots.

7. Items numbered 10 and 12 – 15 in the §61 also incorporate the "income from" phraseology, so you just need to remember to replace 'income' with 'profit' for the correct meaning.
8. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).