Liberty Tree

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Let's Be Frank

The *Brushaber* Decision, Part XI

By Dick Greb

Brushaber & Treasury Decision 2313

In this current series, we've been looking at the decision handed down in the 1916 Supreme Court case *Brushaber v. Union Pacific Railroad Company*.[1] In the last installment, we considered Brushaber's complaint against the corporation being forced to collect taxes from others in light of the 13th Amendment's prohibition against involuntary servitude, even though Frank didn't challenge the withholding on that basis. We also took a quick peek at a complaint originating in one of the two cases bundled with *Brushaber* concerning the delegation of judicial power to an executive branch officer. In doing so, we finally finished with the opinion of Chief Justice Edward White.

I finished up the last installment with a mention of Treasury Decision 2313, issued by the Commissioner of Internal Revenue on March 21, 1916 — two months after the Supreme Court decided the *Brushaber* case. To many people in the tax honesty movement, TD 2313 became some sort of iconic proof of the limited reach of income taxes. All manner of incorrect conjectures were created to justify the belief that citizens were not subject to such taxes. Even the Fellowship, in an early version of its $10,000 challenge, cited TD 2313 for the proposition that "Brushaber was a nonresident alien. His appeal contended that he was being taxed directly, without apportionment."[2]

FRANK R. BRUSHABER, Complainant,
against
UNION PACIFIC RAILROAD COMPANY, Defendant.

To the Judges of the District Court of the United States for the Southern District of New York:

Frank R. Brushaber, a citizen of the State of New York and a resident of the Borough of Brooklyn, in the City of New York, brings this his bill against Union Pacific Railroad Company, a corporation and citizen of the State of Utah, having its executive office and a place of business in the Borough of Manhattan, in the City of New York, and the Southern District of New York, in his own

The reality however was quite different. Frank was a citizen and resident of New York;[3] and his suit contended that Union Pacific was being taxed directly, without apportionment. As was discussed in the first installment, Brushaber's suit — as a stockholder — against the corporation avoided the anti-injunction prohibition, while a suit challenging the constitutionality of his own taxes would not have done so. Since the Fellowship took the position that it was non-resident aliens who were the primary subject of the tax, I suppose the claim was an attempt to incorporate the court's declaration that the income tax was constitutional into that framework.

TD 2313 and limited U.S. jurisdiction

Other people, accepting Frank's claim to be a citizen and resident of New York, mistakenly believe the definition of the term "United States" excludes the individual states. To these people, that actually made Brushaber a *non-resident alien* with respect to that limited version of the United States,[4] which would normally place him outside the jurisdiction of the United States taxing authority. However, they claim, because he received dividends from a *domestic* corporation, he became subject to the tax. But, in order for UPRR to be a domestic corporation, it was necessary to reject Frank's claim that Union Pacific Railroad Company was incorporated on July 1, 1897 in the state of Utah — which would make them a *foreign* corporation by their definition, and instead claimed that Utah was still a territory when the UPRR was created by an act of Congress in 1862. And indeed, it is true that Congress created the original UPRR at that time. However, in January 1874, that railroad company was bought by a company controlled by Jay Gould, who

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1. 240 U.S. 1 (1916).
2. Save-A-Patriot Fellowship's $10,000 Challenge, FACT #16. The later version of this challenge removed these erroneous assertions (See FACT # 15).
3. From Brushaber's *Bill of Complaint*, filed in the District Court of the United States for the Southern District of New York.
4. Even more absurd is their belief that TD 2313 was proof of the government's acknowledgment of Frank's status as such.

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merged it with the Kansas Pacific Railway in 1880, changing the name to Union Pacific Railway.[5] This company went bankrupt in 1893. Thus, it came to pass that a new corporation was formed on July 1, 1897 in Utah (which had become a state in 1896), just as was claimed by Brushaber in his Bill of Complaint, and it was this new company — which chose to use the same name as the original 1862 company — of which he was a stockholder.

One important point to take away from this little history lesson is that while many arguments you may encounter look valid on their face, they start breaking down when you really dig into the specifics. Of course, this is why you should carefully investigate any positions you intend to rely upon, including — perhaps, even especially — those you've held for a long time. That's the reason I've taken the time to analyze the *Hylton*, *Pollock* and *Brushaber* cases at such length. My hope is that offering my own perspective on these cases will help you to come to a fuller understanding of them too, and thus be better able to make any necessary adjustments to your overall positions regarding the operation and application of income taxes.

TD 2313 and nonresident aliens

The other point to recognize is that TD 2313 doesn't support the claims of the tax movement with respect to Frank Brushaber's status or taxability. That's because it has nothing whatsoever to do with Frank himself. Indeed, it can hardly be said to relate in any way to his suit against UPRR. The only thing which purports to show any relation is the opening paragraph of the document:

> Under the decision of the Supreme Court of the United States in the case of Brushaber v. Union Pacific Railway Co., decided January 24, 1916, ***it is hereby held*** that income accruing to nonresident aliens in the form of interest from the bonds and dividends on the stock of domestic corporations is subject to the income tax imposed by the act of October 3, 1913.

Notice that it doesn't say that under the *Brushaber* decision, "it *was* held" that nonresident aliens (NRAs) were subject to the tax. And that's because the taxability of NRAs was not before the court. Therefore, no mention of them was made in Justice White's decision on the case. Rather, it says "it *is hereby* held" — that is, *by this Treasury Decision*, it is held.

The only links between White's decision and TD 2313 are these: first, that the income tax itself was constitutional; and second, that requiring withholding at the source was also constitutional. Thus, in the paragraph above, W. H. Osborn (who was Commissioner of Internal Revenue at the time) simply took the opportunity to establish certain specifics with respect to that adjudged constitutional tax on NRAs. The title of the TD is "Taxability of interest from bonds and dividends on stock of domestic corporations owned by nonresident aliens, and the liabilities of nonresident aliens under section 2 of the act of October 3, 1913." Certainly, there is nothing to indicate that he intended this TD to encompass the entire scope of the income tax, only how it applied to NRAs.

Indeed, the very next paragraph demonstrates the point:

> Nonresident aliens are ***not entitled to the specific exemption designated in paragraph C of the income-tax law,*** but are liable for the normal and additional tax upon the entire net income "from all property owned, and of every business, trade, or profession carried on in the United States," computed on the basis prescribed in the law.

If the tax only applied to NRAs, there would be no purpose in a "specific exemption" which they couldn't claim. Even more to the point is a later paragraph that shows withholding was not limited to NRAs:

> The normal tax shall be withheld at the source from income accrued to nonresident aliens from corporate obligations and shall be returned and paid to the Government by debtor corporations and withholding agents ***as in the case of citizens and resident aliens***, but without benefit of ***the specific exemption designated in paragraph C*** of the law.

Here, the Commissioner shows who can claim the exemption which NRAs cannot claim — citizens and resident aliens, who are likewise subject to withholding at the source. The bottom line is that TD 2313 is really nothing more than a restatement of the law as it applies to NRAs (while ignoring its application to citizens and residents), with a few extra details thrown in regarding returns to be used, etc. That being said, however, I was unable to find any provision in the law itself which denied the cited exemption from being claimed by NRAs.

TD 2313 and Brushaber

If you were to look at the index of Treasury Decisions from that period, under the heading of "Income tax" you would find a subheading for

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5. It's interesting to note that the first paragraph of TD 2313 actually refers to the case as "*Brushaber v. Union Pacific Railway Co.*" although that was not the correct name at that time.

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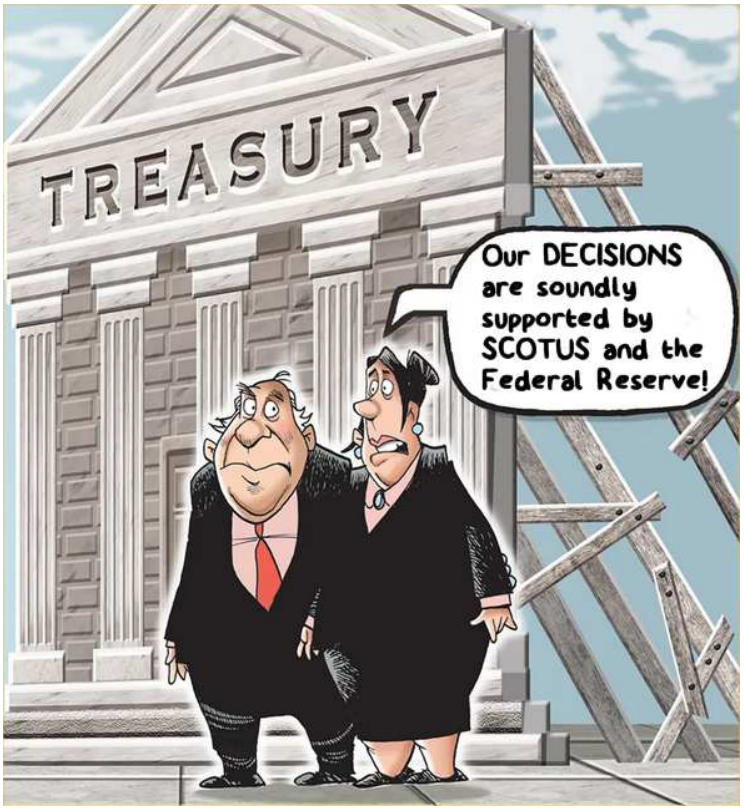
"Brushaber v. Union Pacific Railroad Co." But TD 2313 doesn't appear there. It is listed instead under the subheading "Nonresident aliens." The Brushaber subheading lists TD 2290 as the applicable document. And upon inspection, you find that not only was it published just a week after the case was decided (on January 31, 1916), but that the entire Brushaber decision is reprinted as part of the TD. So, for those with inquiring minds, here is what Acting Commissioner of Internal Revenue David Gates had to say about the case:

> 1. The income tax provisions of the tariff act of October 3, 1913, are held to be constitutional.
> 2. The authority conferred upon Congress by the Constitution to lay and collect taxes, duties, imposts, and excises is exhaustive and embraces every conceivable power of taxation.
> 3. The Constitution lays down two rules by which imposition of taxes must be governed, viz, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises.
> 4. These taxing laws [income tax acts of Civil War period] were classed under the head of excises, duties, and imposts. Although being a tax burden on income of every kind, including that derived from property real or personal, they were not taxes directly on property because of its ownership.
> 5. The income tax act of 1895 was held unconstitutional as being direct in the constitutional sense and therefore void for want of apportionment.
> 6. This [16th] amendment was enacted for the purpose of doing away with the principle on which the decision in Pollock v. Farmers' Loan & Trust Co. was decided.
> 7. The contention on account of its limited retroactivity is not sound, in view of the decision in Stockdale v. Insurance Companies (20 Wall., 323).
> 8. The want of foundation of this contention was pointed out in Knowlton v. Moore (178 U.S., 41), and the right to urge it was foreclosed by that decision.
> 9. The numerous contentions against the validity of the act based upon an assumed violation of the uniformity clause of the Constitution are without legal merit, as that clause exacts only geographical uniformity. There is no basis for the contention based on the due process clause of the Constitution, as that clause is not a limitation upon the taxing power conferred upon Congress by the Constitution.[6]

Clearly, this TD 2290 is directly related to the *Brushaber* decision, and just as clearly, TD 2313 is not. And yet, isn't it odd that it's always the latter one that gets all the attention from the tax movement in their characterization of the *Brushaber* case, and never the former. In fact, I've never heard it mentioned at all, even though the two documents appear in the same volume,[7] a mere 40 pages apart (with eight of those pages being the text of the *Brushaber* case appended to TD 2290). This should raise the question in your mind how anyone came across TD 2313 in the first place. As already



mentioned, TD 2290 is the only one listed under the "Brushaber" subheading in the index, whereas TD 2313 is one of five different TDs listed under the "Nonresident aliens" subheading. But somehow it was found and proclaimed — wrongly, as it turns out — to be the ultimate expression of the Brushaber case, while TD 2290 remained apparently undiscovered and unknown. Can mere chance account for this curious happenstance?

TD 2300 and Tyee Realty Co.

Before moving on from the subject of Treasury Decisions, let's take another look at the aforementioned Treasury Decision index. Under the main heading of "Income tax" there is also a subheading titled "Constitutionality (Tyee Realty Co. v. Anderson)" which lists TD 2300, published on March 3, 1916, a little more than a week after the

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6. (T.D. 2290.) *Income tax act of October 3, 1913—Decision of the Supreme Court.* (Paragraph headings omitted.)
7. Volume 18 of "*Treasury Decisions under internal-revenue laws of the United States, January – December, 1916.*" TD 2290 is on pages 13-21 and TD 2313 is on pages 53-55.

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decision in the two cases argued with *Brushaber*, which was also written by Justice White.[8] Here's what Acting CIR Gates had to say about that decision:

> QUESTION OF CONSTITUTIONALITY
> The claim that the income tax is a direct tax and outside of the sixteenth amendment and unconstitutional disposed of by the decision in Brushaber v. Union Pacific Railroad Co. (T. D. 2290). The claim that it was repugnant to the Constitution on account of its retroactive feature and on account of the provision for a progressive tax also disposed of by said decision.

It should be noted that this TD, like most of the ones between the two already discussed, are hardly more than a means to highlight the Supreme Court's recent decisions. So, while the text above provides no real added insight into the constitutionality of the tax, it did provide the Commissioner an opportunity to reprint the *Tyee* decision. As already mentioned, *Tyee* and *Thorne* were argued with the *Brushaber* case, but for some reason White chose to issue a separate decision for them. As Gates states above, all issues raised were considered by White to have been disposed of by his decision in *Brushaber*, and so wouldn't have merited any special notice, except that in his introductory paragraph, White shows that the constitutionality of the tax wasn't limited to corporations:

> Both the plaintiffs in error, the one in 393 a corporation and the other in 394 ***an individual***, *paid under protest* to the collector of internal revenue, *taxes assessed under the income tax section of the tariff act of October 3, 1913*. After an adverse ruling by the Commissioner of Internal Revenue on appeals which were prosecuted conformably to the statute by both the parties for a refunding to them of the taxes paid, these suits were commenced to recover the amounts paid on the ground of the repugnancy to the Constitution of the section of the statute under which the taxes had been collected, and the cases are here on direct writs of error to the judgments of the court below, sustaining demurrers to both complaints on the ground that they stated no cause of action.[9]

As you can see, Edwin Thorne's suit was an appeal of his suit for a refund of the taxes he paid under protest. I raise this point to preclude an argument I've heard that White's proclamation of the income tax being an excise necessarily restricts its application to corporations. So despite Brushaber's suit dealing only with the income tax as it applied to a corporation, Thorne's suit dealt with its application to himself, an individual. And White upheld the tax as constitutional against Thorne as well as against Union Pacific and Tyee Realty.

Let's be frank

The intent of this series has been to show that, despite the apparent widespread belief that the *Brushaber* decision — which is pretty much the touchstone for interpreting the 16th Amendment — is somehow favorable to the tax honesty movement, the reality is quite the opposite. The amendment, as expounded by White, restored the status quo that existed prior to the *Pollock* decision. By preventing the courts from considering the source from which income was derived in determining whether a tax was direct or indirect, being the only basis on which the *Pollock* court found the 1894 income tax to be unconstitutional, Congress was able to continue treating income taxes as indirect taxes just as they had done ever since they first introduced them in 1861. And that's really the point. Even though income taxes *in reality* are direct taxes on property, Congress has *never* treated them as anything other than excises. And except for the minor glitch brought about by Chief Justice Fuller in the *Pollock* case — a flawed decision striking down the tax on the narrow issue of 'source,' while ignoring the larger issue of *income being property regardless of its source*, the black-robed liberty thieves have consistently upheld Congress' position.

Indeed, that's the root of many of our problems today: Congress' continual encroachment of powers not delegated to them by our Constitution, and the courts' uninterrupted dereliction of their duty to uphold the rights of we the people. But we will not free ourselves from this situation by clinging to false beliefs and wishful thinking. It is my sincere hope that this study of the *Brushaber* case, as well as my earlier ones on *Hylton*[10] and *Pollock*,[11] will be useful to you in getting to the truth.

8. *Tyee Realty Company v. Anderson* [Docket No. 393] and *Thorne v. Anderson* [Docket No. 394], 240 U.S. 115 (Decided February 21, 1916).
9. *Tyee Realty Co.*, 240 U.S. 115, 116. Emphases added and internal citations omitted throughout.
10. For the *Hylton* series, see https://tinyurl.com/mryrd2kv.
11. For the *Pollock* series, see https://tinyurl.com/ykexnf3z.