7/16/2024

No. 24-56

IN THE

Supreme Court of the United States

JANELLE R. POLK,

Petitioner,

v.

CALIFORNIA FRANCHISE TAX BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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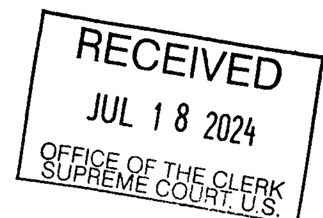

QUESTION PRESENTED

The State of California, like many states that impose a state income tax, bases its statutory definition of the term "gross income" on 26 U.S.C. §61. Though §61(a) provides a general definition of "gross income", it also references other meanings of that term found in Subtitle A of 26 U.S.C., by way of the qualifying language: "Except as otherwise provided in [Subtitle A]..." In the decision below, the California Court of Appeal held that the entire amount of hourly wages paid to an individual for her labor performed in Burbank, California for Warner Bros. necessarily constitute gross income "for purposes of [26 U.S.C.] section 61(a)", while failing to consider whether §872(a) is the applicable federal definition of "gross income". The legal theory in the decision below seems to be that all gross receipts paid to any individual in exchange for his or her labor performed anywhere in the United States of America necessarily constitute income derived from a federally taxable source; thus, according to the California Court of Appeal, all such gross receipts necessarily constitute gross income.

The question presented is:

Whether all gross receipts paid to an individual in exchange for his or her labor or services performed in the United States of America are necessarily included by law in "gross income" under the general definitions provided at 26 U.S.C. §61(a) and §872(a).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Janelle R. Polk was plaintiff in the California Superior Court proceedings and appellant in the California Court of Appeal proceedings.

Respondent California Franchise Tax Board was the defendant in the California Superior Court proceedings and appellee in the California Court of Appeal proceedings.

Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Polk v. California Franchise Tax Board*, No. 20STLC09273, Los Angeles County California Superior Court Judgment entered July 5, 2022.

- *Polk v. California Franchise Tax Board*, No. B323205, Court of Appeal of the State of California, Second Appellate District, Division Eight. Judgment entered January 16, 2024.

- *Polk v. California Franchise Tax Board*, No. S283953, Supreme Court of California. Petition for Review denied April 17, 2024.

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PETITION FOR WRIT OF CERTIORARI

Janelle R. Polk respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is unpublished and reproduced at 1a. The opinion of the Superior Court for the County of Los Angeles is unpublished and reproduced at 14a.

JURISDICTION

The judgment of the Court of Appeal of the State of California was entered on January 16, 2024. 1a. A timely petition for rehearing was denied on February 1, 2024. 46a. A timely petition for review was denied by the Supreme Court of California on April 17, 2024. 48a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 61(a) provides:

> 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) —
Annuities;
(9) —
Income from life insurance and endowment contracts;
(10) —
Pensions;
(11) —
Income from discharge of indebtedness;
(12) —
Distributive share of partnership gross income;
(13) —
Income in respect of a decedent; and
(14) —

> Income from an interest in an estate or trust.

26 U.S.C. § 872(a) provides:

> In the case of a nonresident alien individual, except where the context clearly indicates otherwise, gross income includes only—
> **(1)** —
> gross income which is derived from sources within the United States and which is not effectively connected with the conduct of a trade or business within the United States, and
> **(2)** —
> gross income which is effectively connected with the conduct of a trade or business within the United States.

STATEMENT

Introduction

This case brings an "elephant into the room" in terms of federal and state income tax law. 26 U.S.C. § 61(a) and § 872(a) both provide statutory definitions for the term "gross income". Both statutes are undeniably ambiguous as to whether gross receipts paid to any individual for his or her own labor are included in the meaning of "income" and "gross income". The well-settled rule recognized by this

Court is that taxing statutes are construed liberally in favor of the taxpayer. (See for example *United Dominion Indus., Inc. v. United States*, 532 U.S., 822, 839 (2001) (Thomas, J., concurring)). This canon is a manifestation of the notice requirement of due process and could be an essential protection for taxpayers in tax controversies—if it were not for tax agencies and lower courts routinely ignoring it and doing the exact opposite, i.e. construing tax statutes liberally in favor of the government.

The California Court of Appeal in the decision below held that all gross receipts paid to any individual for his labor performed anywhere in the United States of America necessarily constitute gross income to that individual "for purposes of section 61(a) of title 26 of the United States Code (Internal Revenue Code)." 8a. Yet § 61(a) is ambiguous as to what is "income"; it is ambiguous as to *whose* income is included in the definition of "gross income"; and it certainly does not include gross receipts paid to anyone for his or her labor in clear and unequivocal language. This emperor has no clothes.

Judge Learned Hand famously said, "There are two systems of taxation in our country: one for the informed and one for the uninformed. Both are legal." A de facto system of tax administration based on construing tax statutes liberally in favor of the government is legal, so long as the taxpayer does not challenge that construction and does not raise a genuine issue as to the taxpayer's liability. In this

case, the failure to construe the law liberally in favor of the taxpayer is challenged, and there is a genuine issue before this Court as to the taxpayer's liability, notwithstanding attempts in the decision below to pretend otherwise.

While the decision below may comport with common belief, and with what tax agencies and some lower courts want all of us to believe, this Court has indicated that the matter is not so cut and dried: stating in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 25 (1978), that "wages *usually* are income" [emphasis added] and noting "there are exceptions." Since (according to this Court) wages are "usually" but not *always* income, the California Court of Appeal's holding that wages are *necessarily* income is plainly incorrect. This Court's statement is emblematic of the gap between the two tax systems referred to by Judge Hand. Perhaps wages "usually are income" only because the uninformed taxpayer usually does not resist having his wages treated as such. A taxpayer is permitted to treat his remuneration for labor as gross income for tax purposes; but there certainly is no law compelling anyone to do so.

The decision below points to no precedent of this Court to supports its holding--because none exists. More than a century ago, this Court declared the meaning of "income" to be "definitely settled by decisions of this court." (*Merchants' L. T. Co. v. Smietanka*, 255 U.S. 509, 519 (1921), without ever

holding that gross receipts paid to an individual for his labor are included within that meaning.

In the absence of an affirmative decision from this Court deciding this question, taxpayers trying to assert their right to exclude their remuneration for labor from gross income are defenseless against the abuse of the de facto system of tax administration; a system rooted in the irresponsible dicta of some lower federal courts, and operating in an alternate reality--not based in truth or substance and respect for constitutional limitations, but rather built on a foundation of presumptuousness, deception and intimidation. This de facto tax administration system has for decades preyed on uninformed taxpayers not educated in statutory construction, and in the process has duped and/or intimidated millions of working Americans out of many trillions of dollars.

Tax agencies construing "gross income" liberally in the government's favor to necessarily include all remuneration for labor threaten $5,000 civil penalties and even criminal prosecution against taxpayers attempting to exercise their right to construe the tax law liberally in their favor and exclude from "gross income" their remuneration for their own labor.

The decision below blesses this abuse and invites more of it. Amazingly, this Court has never affirmatively settled the question presented in this case. This case thus represents a defining moment in

American history and the relationship between the government and the People. This Court must stand for the rule of law and interpret the law faithfully, come what may.

A. Legal and factual background

State of California tax law incorporates federal law in defining "gross income" for state income tax purposes. California Revenue & Tax Code § 17071 states: "Section 61(a) of the Internal Revenue Code, relating to gross income defined, shall apply, except as otherwise provided." No other provisions of state law regarding "gross income" are applicable to this case. Therefore, for purposes of this case, the amount of California gross income is the same amount as federal gross income. Thus, this state income tax case turns on the question of whether the individual's remuneration for her labor is included in gross income under applicable provisions of federal law.

This Court long ago recognized that "[T]he 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." *Gregory v. Helvering*, 293 U.S. 465, 469 (1935)

Janelle R. Polk worked for Warner Bros. Studio Enterprises (Warner Bros.) in 2009 as an hourly employee in Burbank, California. 2a. Polk was paid $59,985.28 in hourly wages for her services in 2009.

2a. Polk omitted those wages from the gross income she reported on her 2009 federal and state returns. 3a.

Polk simply applied the canon that taxing statutes are construed liberally in favor of the taxpayer; and on that basis concluded that no law clearly and unequivocally includes her remuneration for her labor in "gross income."

It is undeniable that both § 61(a) and § 872(a) are ambiguous as to whether wages or any other remuneration for labor is included in their definitions of "gross income."

A taxpayer who determines an item is not included in the taxpayer's federal gross income may lawfully omit the item from the gross income reported on the taxpayer's return. Treasury Decision 3146, Article 71 states, in pertinent part:

> **What excluded from gross income.**- Gross income excludes the items of income specifically exempted by the statute and also certain other kinds of income by statute or fundamental law free from tax. Such tax-free income should not be included in the return of income and need not be mentioned in the return, unless information regarding it is specifically called for, as in the case, for example, of interest on

> municipal bonds . See article 402. The exclusion of such income should not be confused with the reduction of taxable income by the application of allowable deductions.

It is well-settled that a taxpayer is entitled to a strict construction of tax law against the government. See *United Dominion Indus., Inc. v. United States,* 532 U.S., 822, 839 (2001) (Thomas, J., concurring) Logically, then, it is not permissible to simply assume an item is intended to be included under provisions of a tax law and then require the taxpayer to prove a negative. This is in contrast with deduction cases where the taxpayer has the burden of proving he is entitled to a claimed deduction. See for example *Gatlin v. C.I.R*, 754 F.2d 921, 923 (11th Cir. 1985) ("In determining which party bears the burden of proof, it is necessary to differentiate between unreported income cases and deduction cases.")

Where a taxpayer has excluded an item from tax, the burden is on the taxing agency to prove that excluded item was intended to be included under provisions of applicable law. See for example: *In re Twisteroo Soft Pretzel Bakeries, Inc.,* 21 B.R. 665, 667 (Bankr. E.D. Pa. 1982):

> "Initially, it is important to bear in mind the distinction between a tax exclusion and a tax exemption. Tax exemptions are items which the

> taxpayer is entitled to excuse from the operation of a tax and, as such, are to be strictly construed against the taxpayer. Tax exclusions, on the other hand, are items which were not intended to be taxed in the first place and, thus, to the extent there is any doubt about the meaning of the statutory language, exclusionary provisions are to be strictly construed against the taxing body. In fact, tax laws in general (with the exception of exemption clauses) are construed in favor of the taxpayer and against imposition of the tax unless the legislative intent is clear and unambiguous."

The California Franchise Tax Board (FTB) initially determined Polk's state tax for 2009 is $0 and issued Polk a refund of the entire $2,863 Warner Bros. had withheld as state income tax from Polk's pay in 2009. 3a.

In 2012, Polk amended her 2009 federal return, solely to amend her federal income tax status from "United States person" to "nonresident alien individual." 63a-64a. The IRS instructions for the amended return form 1040-X provide for a taxpayer to amend the original return for this purpose.

(See https://www.irs.gov/instructions/i1040x): Resident and nonresident aliens. "Use Form 1040-X to amend Form 1040-NR. Also use Form 1040-X if you should have filed Form 1040 instead of Form 1040-NR, or vice versa."

Treasury Regulations under 26 U.S.C. §1 distinguish the two classes of individuals for federal income tax purposes: an individual that is a nonresident alien and an individual that is a "citizen or resident of the United States" (Title 26 of the Code of Federal Regulations 26 CFR §1.1-1(a)(1). A "citizen or resident of the United States" is included in the 26 U.S.C. § 7701(a)(30)(A). definition of the term "United States person".

As with Polk's original 2009 federal return, Polk omitted from her gross income the $59,985.28 Polk was paid by Warner Bros. for her labor. 101a-103a.

In the case of a nonresident alien individual "gross income" under § 872(a) has a narrower definition than in § 61(a). Polk determined that, even if her remuneration were determined to otherwise constitute "gross income", it would not be included within the narrower meaning of "gross income" under § 872(a).

The Internal Revenue Service (IRS) accepted and processed Polk's amended 1040NR nonresident alien individual return in 2012. 65a.

On page 1 of her 1040NR return, Polk checked a "filing status" box indicating she was a "Single resident of Canada or Mexico, or a single U.S. national." 99a. On page 5 of the 1040NR return, under "other information" Polk answered the question "Of what country or countries were you a citizen or national during the tax year?" with the answer: "United States of America". 103a.

The term "nonresident alien individual" is exclusively a federal income tax status. It is not to be confused with an immigration status. The term includes foreign nationals who are not resident aliens; but it also includes any American Citizen or national who chooses and establishes the federal income tax status of "nonresident alien individual" for a given tax year, by filing a 1040NR nonresident alien return, rather than the federal income tax status of "citizen or resident of the United States." *(*See § 873(b)(3), which indicates that a "national of the United States" is--or at least may be--a nonresident alien individual.)

Clearly Congress expresses in § 873(b)(3) that an American Citizen or national need not relinquish his American Citizenship/nationality in order to establish "nonresident alien individual" federal income tax status for a given tax year. Expatriation is another means for an American Citizen or national to

obtain "nonresident alien individual" tax status. However, such an individual in the process of expatriation would obviously cease to be an American Citizen or national. *Id.* § 877. Thus, a nonresident alien individual that is a national of the United States *Id.* § 873(b)(3) is by definition *not* an individual who has expatriated and relinquished his American nationality.

In 2014, after an IRS audit of Polk's federal return, the FTB examined Polk's 2009 state tax return and proposed a state tax assessment of $3,018. 22a-23a.

Polk protested the proposed assessment. Polk contended that, because the FTB's proposed assessment was based on an arbitrary and erroneous IRS determination of unreported gross income made in the federal audit, the FTB proposed assessment was likewise erroneous. 16a.

During the protest proceeding, Polk informed FTB that Polk had amended her 2009 federal return to a 1040NR return to establish "nonresident alien individual" federal tax status. 65a-66a. Polk furnished FTB with a copy of an additional 2009 nonresident alien return Polk had filed with IRS in order to request audit reconsideration. 66a-67a. FTB purportedly affirmed the assessment through a Notice of Action dated May 11, 2015. 30a.

After making a partial payment of the amount FTB claimed was due, Polk filed a claim on June 13, 2017 for refund of the $1,290 Polk had paid. 23a.

In the refund claim, Polk stated as her grounds that the correct state tax is $0. 17a. Polk stated that no valid assessment of state income tax had been made. 18a. Polk stated in the refund claim that the FTB determination to uphold the assessment was erroneous. 18a. Polk also stated in the refund claim that Polk was not a "United States person". 49a-50a.

After the amount FTB claimed to be due was fully satisfied, Polk filed a second refund claim on August 2, 2018, for an additional $3,779.87. 31a.

In the second refund claim, Polk stated that the contents of Polk's previous refund claim are incorporated into her second refund claim. 24a.

FTB denied both refund claims, stating in a notice to Polk "Since California law is the same as federal law for the issues involved, we consider our Notice of Proposed Assessment dated 06/10/2014 to be correct." 19a.

B. Procedural History

Polk filed this action in the Superior Court of the County of Los Angeles to recover refunds of state income tax Polk paid to satisfy her purported state income tax liability. 15a. Polk alleged in her

complaint that the FTB's determination to uphold its proposed assessment was erroneous and that the correct amount of tax is $0. 18a.

FTB filed a motion for summary judgment with the trial court, purporting to prove that Polk was not entitled to any refund because "Polk's payments from Warner Bros. are subject to taxation..." 51a. In its motion, FTB argued that the "keystone of Polk's claim for refund is that she does not owe income tax on the payments she received from Warner Bros. in 2009. But as a matter of law, she is mistaken." 52a. FTB argued that "there is no question that the money Polk earned from her work with Warner Bros. is income..." citing U.S.C. § 61(a) alongside what FTB contended is the applicable state statute. 53a. In effect, FTB argued that the money Polk earned necessarily constitutes "income" under federal law and is therefore included in "gross income" under § 61(a), and on that basis is included in "gross income" under applicable state law. 54a.

FTB further argued that "the IRS specifically advised taxpayers when it issued Rev. Rul. 2007-19 that wages and other compensation received in exchange for personal services is taxable income(sic)." 54a-55a. FTB argued "Thus, Polk's payments from Warner Bros. are subject to taxation..." 55a. FTB's argument in effect was that Polk's payments are subject to state taxation because they are subject to federal taxation, according to the opinion of an IRS attorney in a Revenue Ruling.

FTB made no allegations as to Polk's federal income tax status, neither arguing that Polk was a United States person, nor that Polk was a nonresident alien individual. FTB did not dispute facts showing that Polk established "nonresident alien individual" federal tax status but asserted those facts are "not material to FTB's motion for summary judgment." 63a-67a.

Polk filed an opposition memorandum to FTB's motion, arguing that FTB had stated insufficient facts to conclude that Polk's remuneration for labor constitutes "gross income" under applicable federal law. 58a. Polk argued that FTB had construed §61 as included in gross income all compensation for services paid to anyone, anywhere in the world. 58a. Polk argued that Treasury's interpretation of §61 at 26 C.F.R. § 1.61-2 indicates that not all compensation for services is necessarily income, due to the "unless excluded by law" qualifying language of that provision. 58a-59a.

Polk presented evidence to show that Polk had established "nonresident alien individual" federal income tax status. 63a-65a. Polk argued that on that basis, § 872 (not § 61) is the applicable provision for determining "gross income" and that the undisputed evidence indicated Polk's remuneration for her labor is not included in her gross income, even under the narrower definition of "gross income" in § 872. 60a.

FTB did not dispute that § 872 is the applicable provision for determining gross income in this case.

After a hearing, the Superior court granted FTB's motion. 14a. The Superior court failed to address Polk's argument that § 872 is the applicable definition for determining "gross income". 14a.

The Superior Court held that Polk's remuneration is "gross income" under §61(a), on the basis that "[Polk's] refund claims do not assert any applicable exception." 34a-35a. The Superior Court held that as a matter of law, the payments Warner Bros. made to Polk "are subject to the broad definition of gross income unless specific exception applies (sic)." 35a.

Polk timely appealed the judgment to the California Court of Appeal. 1a. On appeal, Polk argued that the Superior court erred by failing to construe the federal taxing statutes strictly against the government. 69a-81a. Polk argued that § 61 cannot reasonably be construed to necessarily include Polk's remuneration for her labor. 69a-81a.

Polk argued that the Superior court's construction of § 61 is impermissible, because such construction assumes the federal income tax is an unconstitutional unapportioned direct tax falling on Polk's personal property (i.e., her hourly wages). 71a-72a.

Polk argued that in any case the trial court failed to apply the correct provision for determining gross income in this case, which is § 872(a), due to undisputed facts showing that Polk had established "nonresident alien individual" federal tax status. 82a-86a.

The California Court of Appeal affirmed the Superior Court's judgment, holding that Polk's wages "are gross income for the purposes of section 61(a) of title 26 of the United States Code..." 8a. The Court of Appeal held that the mere facts that Polk was paid hourly wages for her work by Warner Bros. in Burbank, California are sufficient to conclude Polk's wages "are gross income for the purposes of section 61(a) of title 26 of the United States Code (Internal Revenue Code.)"

The Court of Appeal stated that Polk "is wrong that income tax on her wages is a direct tax that must be apportioned to avoid conflict with the United States Constitution" because "the Sixteenth Amendment removed the apportionment requirement for direct taxes." (quoting *Zuckman v. Dept of Treasury* (2d Cir. 2012) 448 Fed.Appx. 160, 161.) 7a.

The Court of Appeal held that "we lack jurisdiction to even consider" Polk's arguments regarding § 872(a) because in her refund claims "Polk never raised Internal Revenue Code section 872 (sic) nor claimed to be a nonresident alien." 9a. On that basis, the Court of Appeal held that Polk had failed to

exhaust her administrative remedies as to that issue. 9a.

Polk timely petitioned the Court of Appeal for a rehearing, arguing that because the Court of Appeal ruled on an issue not raised by either party (i.e., that Polk failed to exhaust administrative remedies as to her "nonresident alien individual" status) a rehearing was mandatory under state law, since Polk had not been provided any prior opportunity to brief that issue. 91a-92a.

Polk argued that the Court of Appeal had a duty (regardless of what specific grounds Polk raised in her refund claims) to consider whether § 872(a) is the applicable law defining "gross income" for federal tax purposes. Polk argued that is because FTB as moving party for summary judgment has the burden of proving its claim that Polk's earnings constitute gross income under applicable federal law; and the facts before the Court establish Polk's "nonresident alien individual" federal tax status. 93a-94a.

Polk in any case demonstrated that the record of the case before the California Court of Appeal showed that Polk did claim to be a nonresident alien in her first refund claim because she stated in that claim that she was not a United States person. 92a-93a. Also see 49a-50a, which was part of the record of the case before the Court of Appeal.

Polk further argued that the undisputed facts establish that FTB was provided actual notice of Polk's "nonresident alien individual" federal tax status during the protest proceedings against FTB's proposed assessment. 65a-67a. Thus, Polk argued, the Court of Appeal had no valid basis in fact for holding that Polk failed to exhaust her administrative remedies.

The Court of Appeal denied the petition without comment.

Polk timely petitioned the California Supreme Court. The California Supreme Court denied the petition on April 17, 2024.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Has No Basis in Law; it Disregards the Well-Settled Canon of Strict Construction for Taxing Statutes and this Court's Precedents Regarding the Meaning of Income

The decision below is not only wrong, its holding with respect to "gross income" has no basis in law whatsoever. A cursory review of the California Court of Appeal's basis for its decision quickly reveals that the emperor has no clothes. The California Court of Appeal relies for its holding solely on dicta from inapposite lower court cases and on a misinterpretation of the Sixteenth Amendment.

The California Court of Appeal held that Polk's wages are necessarily income for federal tax purposes--not based on any legal reasoning or any statutory construction, but based on dicta of the United States Tax Court in *Reading v. Commissioner* (1978) 70 T.C. 730, 734, affirmed in *Reading v. Commissioner* (8th Cir. 1980) 614 F.2d 159, 160.) 8a.

The *Reading* case is inapposite; there was no genuine issue before that court regarding whether the taxpayer's gross receipts from the sale of her labor constitute "gross income" because the taxpayer conceded those amounts were included in her gross income. The question of that case involved deductions the taxpayer had claimed; it did not involve a tax agency claiming that a certain unreported item constitutes gross income.

The California Court of Appeal also relied on dicta from *Zuckman* in which that court proclaimed that "wages are taxable income." 7a. That case is also inapposite. The *Zuckman* case involved a taxpayer suing to oppose collection of his tax liability. There was no genuine issue before the *Zuckman* court as to the taxpayer's tax liability.

The California Court of Appeal, though it did not formally hold that Polk's appeal was frivolous, nevertheless thought it worth mentioning that "Courts have repeatedly rejected as frivolous the

contention that wages are not taxable income". 6a-7a. The California Court of Appeal apparently believes that statement somehow amounts to a rule of law that wages are necessarily income. But no amount of lower court cases can overcome the lack of any clear statutory language that includes wages in "gross income".

The four cases cited by the California Court of Appeal as examples of courts rejecting as "frivolous" the contention that "wages are not income" are all inapposite because the taxpayer's liability was not a genuine issue before the court in any of those cases. Thus, the taxpayer's argument regarding the meaning of "income" in each of those cases was not even considered; it was properly rejected as frivolous. This certainly does not make a taxpayer's determination that her wages are excluded by law from her gross income necessarily frivolous in every case. The lower courts of this land apparently need the guidance of this Court in order to acknowledge such nuances.

This Court stated in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 25 (1978) that "wages are *usually* income" [emphasis added] and noted "there are exceptions." Ironically, if a Justice of this Court were to include those very words on his federal tax return, the IRS would likely impose a $5,000 frivolous return penalty against him.

Faced with a genuine issue of whether Polk's remuneration constitutes gross income, the California Court of Appeal "addressed" that issue by relying on cases where no such issue was before the court, then pretending those cases establish that there can never possibly be a genuine issue before *any* court as to whether remuneration for labor constitutes gross income.

The California Court of Appeal inexplicably failed to address Polk's argument that the § 61(a) definition of "gross income" is ambiguous as to whether the term includes wages and must be strictly construed against the government. 69a-81a.

There is no denying that § 61 is ambiguous in multiple ways. For example, the word "wages" does not appear in that provision. Neither does the word "labor". Are "wages" considered to be encompassed by the term "compensation for services"? If so, *whose* wages/compensation for services are being referred to in § 61 ? Does it mean any compensation for services paid to anyone in the world? Is "compensation for services" itself an example of "income derived from a source" or is it only a source from which income might be derived? Or it is both?

This Court has long held that ambiguities in tax statutes are to be construed in favor of the taxpayer. In *Gould v. Gould*, 245 U.S. 151, 153 (1917), this Court recognized that "the established rule" in "the interpretation of statutes levying taxes" is to not

go "beyond the clear import of the language used" in the statute. Thus, "[i]n case of doubt [tax statutes] are construed *most strongly against the government*, and in favor of the citizen." *Id.* (collecting cases since 1842) (emphasis added). That holding was affirmed just a few years later. *United States v. Merriam*, 263 U.S. 179, 188 (1923) (applying *Gould*, 245 U.S. at 153) ("If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."); *see also Hassett v. Welch*, 303 U.S. 303, 314 (1938) (applying *Gould*, and holding that "if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer . . ."). Members of this Court continue to apply this rule. *See, e.g., United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 838–39 (2001) (Thomas, J., concurring) (collecting cases including *Merriam*).

On the basis of this canon of statutory construction alone, this Court should have little trouble answering the question this case presents.

The California Court of Appeal attributed to Polk an argument Polk did not make, that "income tax on her wages is a direct tax that must be apportioned". 7a.

The argument Polk actually made is that the income tax is *not* a direct tax; which is why the Superior Court erred by *construing* it as a direct tax falling on Polk's wages, because the tax is not apportioned. 71a-72a.

In holding that Polk is "wrong that income tax on her wages is a direct tax that must be apportioned to avoid conflict with the United States Constitution" (7a.) the California Court of Appeal apparently *conceded* that it was affirming the Superior Court's construction of § 61 as if the federal income tax is a direct unapportioned tax on personal property.

According to the California Court of Appeal, that is a permissible construction, however, because "the Sixteenth Amendment removed the apportionment requirement for direct taxes." 7a.

That holding is plainly at odds with this Court's interpretation of the Sixteenth Amendment, as recently reiterated by this Court in *Moore v. United States,* No. 22-800, at *37 (June 20, 2024) (J. Barrett and J. Alito concurring opinion.) ("The Sixteenth Amendment and the Direct Tax Clause distinguish between taxes on property, which are subject to apportionment, and taxes on income derived or realized from that property, which are not").

That the California Court of Appeal resorted to such a spurious assertion regarding the effect of the Sixteenth Amendment makes clear how legally indefensible its holding in the decision below really is.

Furthermore, this Court defined the term "income" over the course of many cases and declared the meaning of "income" to be "definitely settled by

decisions of this court" in *Merchants' L. T. Co. v. Smietanka*, 255 U.S. 509, 518-19 (1921):

> "It is obvious that these decisions in principle rule the case at bar if the word "income" has the same meaning in the Income Tax Act of 1913 that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in *Southern Pacific Co.* v. *Lowe*, 247 U.S. 330, 335, where it was assumed for the purposes of decision that there was no difference in its meaning as used in the Act of 1909 and in the Income Tax Act of 1913. There can be no doubt that the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913. When to this we add that in *Eisner* v. *Macomber, supra,* a case arising under the same Income Tax Act of 1916 which is here involved, the definition of "income" which was applied was adopted from *Stratton's Independence* v. *Howbert, supra,* arising under the Corporation Excise Tax Act of 1909, with the addition that it should include "profit gained through a sale or conversion of capital assets," there would seem to be no room to

> doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this court."

By no stretch of imagination can this "settled" definition of income be found to unambiguously include gross receipts paid to an individual for his or her labor.

This Court indicated that income might be derived from labor in *Eisner v. Macomber*, 252 U.S. 189, 207-08 (1920):

> "After examining dictionaries in common use (Bouv. L.D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185) — ""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* (pp. 183, 185). Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. " *Derived — from — capital;*" — "the *gain — derived — from — capita l*," etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; — *that* is income derived from property. Nothing else answers the description. The same fundamental conception is clearly set forth in the Sixteenth Amendment — "incomes, *from* whatever *source*

> *derived*" — the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.")

This Court made it clear in defining "income" that labor itself is only a *source* from which income might be derived. Of course, labor also may be exchanged for something of equal value. The exchange of labor for money therefore does not invariably produce a profit or income. Deriving income from labor is not clearly and unequivocally the same thing as receiving money in exchange for one's own labor.

This Court has consistently distinguished gross receipts from income. See e.g. *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335 (1918); *Doyle v. Mitchell Brothers Co.*, 247 U.S. 179, 184-85 (1918)

The California Court of Appeal conceded that gross receipts paid to a business are not income, yet effectively held that somehow income is defined differently when gross receipts are paid to an individual. 7a-8a. The California Court of Appeal presented no valid basis in law for making any such distinction.

Returning to statutory construction and the well-settled rule that tax statutes are strictly construed against the government, the failure of

Congress to provide any definition in the statute for the word "income" is alone fatal to any attempt to construe "income" as necessarily including gross receipts for labor. The term "income" is not defined in 26 U.S.C.

Thus, the "definition" of "gross income" *Id.* § 61 is not a true definition; it is only an unhelpful tautology.

In any case, the California Court of Appeal had no basis in law for refusing to consider whether § 872(a), is the applicable provision for determining Polk's gross income (even if the remuneration is somehow otherwise considered to be income).

The California Court of Appeal clearly presumed § 61 is the applicable provision, without explaining why. The "except as otherwise provided" language of that provision indicates that § 61 is not exclusive and does not provide the only definition for the term "gross income" in Subtitle A of 26 U.S.C.

As the undisputed facts show that Polk established "nonresident alien individual" federal tax status, § 872(a) is the applicable statute for determining Polk's gross income. 63a-65a.

Strictly construing § 872(a) against the government, Polk is entitled to a construction of "United States" that is non-geographical and thus not clearly defined in 26 U.S.C. See § 7701(a)(9) which

provides a general definition of "United States" only when used in its geographical sense. There is no definition of "United States" provided in 26 U.S.C. when used in its non-geographical sense.

Thus, Polk is clearly entitled in any case to exclude her remuneration (even if income) from "gross income" under the narrower definition provided in § 872(a).

II. This Case Raises An Exceptionally Important Question this Court Has Never Decided

What could be more important for an income tax law than an as yet unanswered question regarding the definition of "income"? It is hard to imagine a case with a larger blast radius than this one. This case affects literally everyone who works for a living in the United States of America, including the Members of this Court who themselves are entitled by law to exclude their compensation from their gross income. There is no provision of 26 U.S.C. that expressly includes *your* compensation in gross income, either.

It is not hyperbole to say that this case could result in the end of the federal income tax as we know it. Good riddance. The federal government must find a way to raise revenue without resorting to constructive fraud upon the People. The lower federal courts have acted as the enabler of the de facto system

of income tax administration for decades. In that system, taxing statutes are construed liberally in favor of the government and the burden of proof is effectively placed on the taxpayer to prove a negative. The California Court of Appeal certainly framed the decision below that way, as if remuneration for labor is automatically presumed to constitute gross income and that Polk had the burden to prove she is entitled to some exception.

This Court has refused to uphold tax enactments that would break down constitutional limitations on the powers of Congress. See *Bailey v. Drexel Furniture Co.*, 259, U.S. 20 (1922). This Court must not stand idly by while tax agencies accomplish the same result via misconstruction and misapplication of taxing statutes.

Without a precedent of this Court to point to, taxpayers are defenseless against agencies like the FTB, who denied Polk's claims for refund without lawful basis, and count on lower courts to be their rubber stamp if the taxpayer litigates his refund claim.

In fact, the irresponsible dicta of lower courts in tax cases over the last several decades has been weaponized by tax agencies to create an alternate reality in which taxpayers can be punished by tax agency personnel for taking what is a perfectly lawful but "non-compliant" position.

Consider Internal Revenue Bulletin, Notice 2010-33 issued by the IRS, which states (in pertinent part):

> Positions that are the same as or similar to the positions listed in this notice are identified as frivolous for purposes of the penalty for a "frivolous tax return" under section 6702(a) of the Internal Revenue Code and the penalty for a "specified frivolous submission" under section 6702(b). Persons who file a purported return of tax, including an original or amended return, based on one or more of these positions are subject to a penalty of $5,000...
>
> (4) Wages, tips, and other compensation received for the performance of personal services are not taxable income ...
>
> ***
>
> (22) A taxpayer may claim on an income tax return or purported return an amount of withheld income tax or other tax that is obviously false because it exceeds the taxpayer's income as reported on the return or is disproportionately high in comparison

> with the income reported on the return...

Thus, the IRS claims the right to penalize a taxpayer $5,000 because some employee of the IRS assumes their claim of withheld income tax is "obviously" false because that employee feels the claim is "disproportionately high in comparison with the income reported on the return."

Such a vague policy could be applied to literally any refund claim. The policy obviously presupposes that if the taxpayer had any amount withheld from a payment, that could only be because the payment from which the amount was withheld necessarily constitutes gross income. This IRS policy arbitrarily brushes aside any possibility that the taxpayer may have had amounts withheld in error because of an ignorant and presumptuous employer who withheld taxes because the employer assumed it is "required by law" when it was not.

This IRS policy of categorically labelling as "frivolous" the contention that wages are not taxable (which is a position supported by this Court's statement in *Central Illinois Public Service Co.*) specifically targets and threatens taxpayers who earn wages or salary or other remuneration for labor and who discover they are entitled by law to exclude their remuneration for labor from their gross income and claim a refund of their withholding. This is an example of the de facto tax administration system

standing in the way of just and lawful tax administration.

In the IRS publication "The Truth About Frivolous Arguments", the IRS cites dozens of federal lower court cases in which courts irresponsibly claim in non-judicial obiter dicta that it is "well-settled" that wages are income. Some of the cases cited by the IRS in this document have nothing to do with wages, such as this Court's decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429–30 (1955):

> **B. The Meaning of Income: Taxable Income and Gross Income**
>
> **1. Contention: Wages, tips, and other compensation received for personal services are not income.**
>
> This argument asserts that wages, tips, and other compensation received for personal services are not income, arguing there is no taxable gain when a person "exchanges" labor for money. Under this theory, wages are not taxable income because people have basis in their labor equal to the fair market value of the wages they receive; thus, there is no gain to be taxed.
>
> ***

Another similar argument asserts that wages are not subject to taxation where individuals have obtained funds in exchange for their time. Under this theory, wages are not taxable because the Code does not specifically tax "time-reimbursement transactions." Some individuals or groups argue that the Sixteenth Amendment to the United States Constitution did not authorize a tax on wages and salaries, but only on gain or profit.

The Law: For federal income tax purposes, "gross income" means all income from whatever source derived and includes compensation for services. I.R.C. § 61. Any income, from whatever source, is presumed to be income under section 61, unless the taxpayer can establish that it is specifically exempted or excluded. *See Reese v. United States*, 24 F.3d 228, 231 (Fed. Cir. 1994) ("[A]n abiding principle of federal tax law is that, absent an enumerated exception, gross income means all income from whatever source derived."). In Rev. Rul. 2007-19, 2007-1 C.B. 843, and in Notice 2010-33, 2010-17 I.R.B. 609, the IRS advised taxpayers that wages and other

compensation received in exchange for personal services are taxable income and warned of the consequences of making frivolous arguments to the contrary.

***

All compensation for personal services, no matter what the form of payment, must be included in gross income. This includes salary or wages paid in cash, as well as the value of property and other economic benefits received because of services performed or to be performed in the future. Criminal and civil penalties have been imposed against individuals who rely upon this frivolous argument.

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Relevant Case Law

Commissioner v. Kowalski, 434 U.S. 77 (1977) – the Supreme Court found that payments are considered income where the payments are undeniably accessions to wealth, clearly realized, and over which a taxpayer has complete dominion.

Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429–30 (1955) – referring to the statute's words "income derived from any source whatever," the Supreme Court stated, "this language was used by Congress to exert in this field 'the full measure of its taxing power.'. . . And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted."

Swanson v. United States, 799 F. App'x 668, 670 (11th Cir.), *cert. denied*, 140 S. Ct. 1270, 206 L. Ed. 2d 257 (2020) – the Eleventh Circuit rejected as frivolous arguments that there is no gain in compensation for labor because the value of the compensation equals the value of the labor.

Richmond v. Commissioner, 474 F. App'x 754, 755 (10th Cir. 2012) – the Tenth Circuit noted that "it is well-settled that wages and interest payments constitute taxable income" and rejected the petitioner's argument to the contrary as "completely lacking in legal merit and patently frivolous."

Callahan v. Commissioner, 334 F. App'x 754, 755 (7th Cir. 2009) – the Seventh Circuit rejected the petitioner's argument that only "the gain from wages" (not wages themselves) is taxable, characterizing the argument as "beyond frivolous."
United States v. Sloan, 939 F.2d 499, 500 (7th Cir. 1991) – in rejecting the taxpayer's argument that the United States' revenue laws do not impose a tax on income, the Seventh Circuit stated that the "Internal Revenue Code imposes a tax on all income."

United States v. Connor, 898 F.2d 942, 943–44 (3d Cir. 1990) – the Third Circuit stated that "[e]very court which has ever considered the issue has unequivocally rejected the argument that wages are not income."

Stelly v. Commissioner, 761 F.2d 1113 (5th Cir. 1985) – the Fifth Circuit imposed double costs and attorney's fees on the taxpayers for bringing a frivolous appeal and rejected their argument that taxing wage and salary income is a violation of the constitution because compensation for labor is an exchange rather than gain.

United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983) – the Eighth Circuit upheld conviction and fines imposed for willfully failing to file tax returns, stating that the taxpayer's contention that wages and salaries are not income within the meaning of the Sixteenth Amendment is "totally lacking in merit."

Lonsdale v. Commissioner, 661 F.2d 71, 72 (5th Cir. 1981) – the Fifth Circuit rejected as "meritless" the taxpayer's contention that the "exchange of services for money is a zero-sum transaction."

United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981) – the Ninth Circuit affirmed Romero's conviction for willfully failing to file tax returns, stating that "[his] proclaimed belief that he was not a 'person' and that the wages he earned as a carpenter were not 'income' is fatuous as well as obviously incorrect."

Sumter v. United States, 61 Fed. Cl. 517, 523 (2004) – the court found Ms. Sumter's "claim of right" argument "devoid of any merit" stating that section 1341 only applies to situations

in which the claimant is compelled to return the taxed item because of a mistaken presumption that the right held was unrestricted and, thus, the item was previously reported, erroneously, as taxable income. Section 1341 was inapplicable here because she had a continuing, unrestricted claim of right to her salary income and had not been compelled to repay that income in a later tax year.

Carskadon v. Commissioner, T.C. Memo. 2003-237, 86 T.C.M. (CCH) 234, 236 (2003) – the court rejected the taxpayer's frivolous argument that "wages are not taxable because the Code, which states what is taxable, does not specifically state that 'time reimbursement transactions,' a term of art coined by [taxpayers], are taxable." The court imposed a $2,000 penalty against the taxpayers for raising "only frivolous arguments which can be characterized as tax protester rhetoric."

Other Cases:

Jacobsen v. Commissioner, 551 F. App'x 950 (10th Cir. 2014); *Garber v. Commissioner*, 500 F. App'x 540 (7th

Cir. 2013); *United States v. Becker*, 965 F.2d 383 (7th Cir. 1992); *United States v. White*, 769 F.2d 511 (8th Cir. 1985); *United States v. Bigley*, 119 A.F.T.R.2d 2017-1792 (D. Ariz. 2017); *United States v. Jones*, No. 14-CV-0227, 2015 WL 6942071 (D. Minn. Nov. 10, 2015) aff'd, 670 F. App'x 907 (8th Cir. 2016); *United States v. Hopkins*, 927 F. Supp. 2d 1120 (D.N.M. 2013); *United States v. Reading*, 110 A.F.T.R.2d 2012-5965 (D. Ariz. 2012); *Abdo v. United States*, 234 F. Supp. 2d 553 (M.D.N.C. 2002); *Green v. Commissioner*, T.C. Memo. 2016-67, 111 T.C.M. (CCH) 1299 (2016); *Leyshon v. Commissioner*, T.C. Memo 2015-104, 109 T.C.M. (CCH) 1535 (2015); *Shakir v. Commissioner*, T.C. Memo. 2015-147, 110 T.C.M. (CCH) 137 (2015); *Snow v. Commissioner*, T.C. Memo. 2013-114, 105 T.C.M. (CCH) 1680 (2013); *O'Brien v. Commissioner*, T.C. Memo. 2012-326, 104 T.C.M. (CCH) 620 (2012); *Pugh v. Commissioner*, T.C. Memo. 2009-138, 97 T.C.M. (CCH) 1791 (2009); *Abrams v. Commissioner*, 82 T.C. 403 (1984); *Reading v. Commissioner*, 70 T.C. 730 (1978).

No matter how many cases the IRS cites, it cannot change the fact that § 61(a) and § 872(a) are ambiguous as to whether wages (or any other form of remuneration for labor) are included in gross income.

The FTB similarly operates under its own preferred version of the tax law. FTB has a link to IRS Notice 2010-33 on its website: https://www.ftb.ca.gov/pay/penalties-and-interest/frivolous-tax-positions.html

These policies of the IRS and state tax agencies not only constitute an attack on a taxpayer's right to avoid income tax using means permitted by law, it is an evasion of constitutional limitations meant to prevent the government from becoming too powerful and oppress the people via taxation. To deny a taxpayer his or her right to exclude his remuneration for labor from gross income is not only a violation of due process; in substance it is subjecting that taxpayer to a form of unlawful involuntary servitude, under the guise of tax administration.

This is nothing less than a complete betrayal of the People by their government.

This de facto tax administration system exists because of the absence of a controlling precedent from this Court on this exceptionally important question. This Court has a duty to interpret the law faithfully, to put a stop to this abuse of the People and take a step toward restoring the master-servant relationship

between the People and the government that the founders of this Republic intended.

III. This Case is an Ideal Vehicle to Settle this Exceptionally Important Question

This case presents this exceptionally important question cleanly. There are no factual disputes or other matters complicating this case. Either Polk's remuneration for her labor is necessarily gross income, or it is not.

This case offers the opportunity for this Court (perhaps for the first time) to apply its textualist-focused approach to both major provisions defining the term "gross income" in 26 U.S.C. These are ambiguous statutory definitions that have stood for decades, affecting many millions of Americans. The definition of "gross income" under § 61(a) has never been interpreted by this Court with respect to remuneration for labor, and § 872(a) has never been interpreted at all by this Court. This Court has the opportunity with this one case to interpret both statutes.

Many taxpayers who have attempted to exercise their rights and challenge misapplication of the tax law against them by the de facto tax administration system have failed to establish a genuine issue for any court to adjudicate because they simply do not know how to effectively navigate the administrative process with predatory taxing

agencies. Others contesting the income tax as applied to their remuneration for labor have tended to raise only constitutional challenges to the tax law.

That has failed, because so long as the statute does not impose tax in clear and unequivocal language (as is certainly the case with § 61(a)), the statute will not be found unconstitutional. The ambiguity of the language of § 61(a) has thus protected federal income tax law from such constitutional challenges for decades, but that ambiguity is a double-edged sword. Ultimately the same ambiguity the de facto tax system exploits to prey upon uninformed taxpayers is that system's Achilles heel.

This case presents a template for how a taxpayer may lawfully exclude his remuneration for labor from his gross income, i.e. by simply omitting the remuneration from the income reported on the return. For that matter, § 61(a) is ambiguous as to whether any particular person's income of *any* kind is included in "gross income."

An affirmative decision from this Court that no one is required under federal tax law to report his remuneration for labor as gross income would facilitate others being able to follow Polk's approach in order to exercise their rights, with a decision from this Court they can point to as their justification. A decision from this Court is the law of the land. A decision explaining that remuneration for labor is not

required to be reported as gross income on a taxpayer's return would give every taxpayer a precedent to point to (perhaps on a statement attached to their tax return) to affirmatively explain their lawful basis for excluding their remuneration for labor from their gross income, in a way that IRS and state tax agencies cannot penalize as "frivolous".

This Court with one decision can help taxpayers defend themselves against the merciless machinery of this predatory de facto tax system. Many taxpayers know "there is something rotten in Denmark" but simply do not know what they can do about it. This Court can fix that with one decision providing an honest and faithful answer to the question presented. The de facto tax system has been like Goliath, taunting the Israelites and defying the God of Israel. One stone took him down. This Goliath must fall.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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