

UNCERTAINTY OF THE FEDERAL INCOME TAX LAWS

For several years now, a variety of high public officials have openly declared that the federal income tax laws are incredibly complex and need to be either substantially revised or scrapped. But after making such statements, these officials invariably fail to identify what specific parts of the tax laws suffer from this condition, choosing instead to conceal them. Are the objectionable parts of the federal tax code secretly and quietly discussed behind closed Congressional committee doors? If they are, why doesn't someone inform the American public of these deficiencies so that they may likewise participate in this debate? Is it possible that it is the major and not various minor features of the tax laws which are complex, even uncertain? Is it possible that these major features are so fundamentally flawed that they simply cannot be repaired? If so, what is the legal consequence of this complexity?

It is alleged that the legal duties arising from the tax laws are clearly known to all, but there are a few exceptions to this rule. For example, in *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974), at issue was the validity of the conviction of an Indian for tax evasion. Here, the Bureau of Indian Affairs had informed Mrs. Critzer that the money she derived from real property located within a reservation was not taxable; Mrs. Critzer relied upon this advice and failed to report such income. But, the IRS maintained a contrary position, had her indicted and secured her conviction for tax evasion. This conviction was reversed on the grounds that the unsettled nature of this field of law precluded any conviction:

"While the record amply supports the conclusion that the underreporting was intentional, the record also reflects that, concededly, **whether defendant's unreported income was taxable is problematical and the government is in dispute with itself** as to whether the omitted income was taxable," *Id.*, at 1160.

"We hold that defendant must be exonerated from the charges lodged against her. As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that **even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions**. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.

"It is settled that when the law is vague or highly debatable, a defendant- actually or imputedly- lacks the requisite intent to violate it," *Id.*, at 1162.

This single case is an adequate demonstration that there is at least one part of the tax code which is unclear and that lack of clarity caused the reversal of Mrs. Critzer's criminal conviction. But there are others; see *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(a prosecution for violating an unclear legal duty abridges principles of due process); *United States v. Garber*, 607 F.2d 92, 97-98 (5th Cir. 1979); *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987); and *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991). Unclear legal duties in other fields of law besides tax likewise prevent criminal convictions on due process grounds; see *United States v. Insko*, 496 F.2d 204 (5th Cir. 1974); *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976); *United States v. Anzalone*, 766 F.2d 676, 681-82 (1st Cir. 1985); *United States v. Denmark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986).

Under the U.S. Constitution, the Congress is authorized to impose two different types of taxes, direct and indirect. Via Art. 1, §8, cl. 1, of the Constitution, indirect taxes (excises, duties and imposts) must be uniformly imposed throughout the country. Direct taxes are required via Art. 1, §2, cl. 3, and Art. 1, §9, cl. 4, to be imposed pursuant to the regulation of apportionment. These tax categories are mutually exclusive and any given tax must squarely fit within one category or the other. To which constitutional category does the federal income tax belong? Is it a direct tax, or is it an indirect tax? Do American courts speak with unanimity about this simple question of what is the nature of this tax?

To determine whether and to what extent there is any uncertainty or conflict of authority regarding the nature of the federal income tax requires at least a short review of the fundamental decisions concerning it. In 1894, Congress adopted an income tax act which was declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895). The *Pollock* Court found that the income tax was a direct tax which could only be imposed if the tax was apportioned; since this tax was not apportioned, it was found unconstitutional. In an effort to circumvent this decision, the 16th Amendment was proposed by Congress in 1909 and allegedly ratified by the states in 1913. As a result, various opinions arose regarding the legal effect of the amendment. Some factions contended that the 16th Amendment simply eliminated the apportionment requirement for one specific direct tax known as the income tax, while others asserted that the amendment simply withdrew it from the direct tax category and placed the income tax in the indirect, excise tax class. These competing contentions and interpretations were apparently resolved in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 36 S.Ct. 236 (1916).¹ Rather than attempt a determination of what the Court held in this case, it is more important to learn what various courts have subsequently declared *Brushaber* to mean.

A little more than a week after the opinion in *Brushaber*, similar issues were present for decision in *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112-13, 36 S.Ct. 278 (1916), which involved the question of whether an inadequate depletion allowance for a mining company constituted a direct tax on the company's property. As to Baltic's contention that "the 16th Amendment authorized only an exceptional direct income tax without apportionment," the Court rejected it by stating that this contention:

"... manifestly disregards the fact that by the previous ruling it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation."

The Court clearly held that income taxes inherently belonged to the indirect/excise tax class, but had been converted by *Pollock* to direct taxes by considering the source of the income; the 16th Amendment merely banished the rule in *Pollock*. See also *Tyee Realty Co. v. Anderson*, 240 U.S. 115, 36 S.Ct. 281 (1916), decided the same day.

¹ In this decision, there is a very lengthy sentence which contains the following phrase: "... by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity, and were placed under the other or direct class," 240 U.S., at 19. This phrase and the one at the very end of this paragraph are almost identical. This language was used to describe the contention the Court was rejecting, not approving.

However, the victory of defining what the 16th Amendment meant was short lived and later decisions commenced a course which appears to have changed the meaning of *Brushaber*, or at least provided fertile grounds for an entirely different and opposite construction of it. In *William E. Peck and Co. v. Lowe*, 247 U.S. 165, 172-73, 38 S.Ct. 432, 433 (1918), which involved a tax imposed on export earnings, the Court seemed to indicate that what was accomplished by the amendment was the elimination of the apportionment requirement for the direct tax known as the income tax, an argument rejected in *Baltic*:

"The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removed all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another."

The drift away from the position of the Court that the income tax via the 16th Amendment fell within the excise tax category became more pronounced with the decision in *Eisner v. Macomber*, 252 U.S. 189, 206, 40 S.Ct. 189 (1920), which involved the application of this tax to a stock dividend. Here, the Court plainly stated what many lawyers and some judges today think was accomplished by means of this amendment, the elimination of the apportionment requirement for the direct tax known as the income tax. In deciding this case, the Court quoted the amendment and then redeclared its meaning:

"As repeatedly held, this did not extend the taxing power to new subjects, **but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income.** *Brushaber*....," 252 U.S., at 206.

"A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, **so as to repeal or modify, except as applied to income**, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal."

Is this the resurfacing of the argument that "the 16th Amendment authorized only an exceptional direct income tax without apportionment" condemned in *Baltic*?

From a study of *Brushaber*, it is thus possible for someone to rely upon those portions of the two phrases at the beginning and ending of 240 U.S. 19 to believe that "the 16th Amendment authorized only an exceptional direct income tax without apportionment." If one fell into that error, this belief would be magnified by the above highlighted portions of *Eisner*. Confusion abounds as to the correct interpretation of *Brushaber*, and this is obvious because various courts of this nation have relied upon this line of authority to reach diametrically opposing results.

The state courts have been particularly split over the nature of an income tax and whether it constitutes a direct property tax or an indirect/excise, which is not imposed on property. A small number of them hold that an income tax is a direct property tax; see *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 58 (1920); *State v. Pinder*, 108 A. 43, 45 (Del. 1919); *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932); *Opinion of the Justices*, 220 Mass. 613, 108 N.E. 570 (1915); *Trefry v. Putnam*, 227 Mass. 522, 116 N.E. 904 (1917); *Maguire v. Tax Comm. of Commonwealth*, 230 Mass. 503, 120 N.E. 162, 166 (1918); *Hart v. Tax Comm.*, 240 Mass. 37, 132 N.E. 621 (1921); *In re Ponzi*, 6 F.2d 324 (D.Mass. 1925); *Kennedy v. Comm. of Corps. & Taxation*,

256 Mass. 426, 152 N.E. 747 (1926); *In re Opinion of the Justices*, 266 Mass. 583, 165 N.E. 900, 902 (1929); *Hutchins v. Comm. of Corps. & Taxation*, 272 Mass. 422, 172 N.E. 605, 608 (1930); *Bryant v. Comm. of Corps. & Tax'n.*, 291 Mass. 498, 197 N.E. 509 (1935); *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81, 82 (1933);² *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936); *State ex rel Manitowoc Gas Co. v. Wisconsin Tax Comm.*, 161 Wis. 111, 152 N.W. 848, 850 (1915); and *State ex rel Sallie F. Moon Co. v. Wisconsin Tax Comm.*, 166 Wis. 287, 163 N.W. 639, 640 (1917). A far larger number of state courts disagree with the cases noted above and have held that an income tax is not a property tax but an excise; see *Purnell v. Page*, 133 N.C. 125, 45 S.E. 534, 535 (1903); *State v. Frear*, 148 Wis. 456, 134 N.W. 673, 692 (1912); *Opinion of Justices*, 77 N.H. 611, 93 A. 311, 313 (1915); *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918); *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4 (1921); *Stanley v. Gates*, 179 Ark. 886, 19 S.W.2d 1000, 1001 (1929); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307, 313 (1932); *O'Connell v. State Board*, 95 Mont. 91, 25 P.2d 114, 119 (1933); *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 400 (1933); *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102, 109 (1934); *Opinion of the Justices*, 133 Me. 525, 178 A. 621, 623 (1935); *Miles v. Dept. of Treasury*, 209 Ind. 172, 199 N.E. 372, 377 (1935)(citing *Brushaber*); *Marshall v. South Carolina Tax Comm.*, 178 S.C. 57, 182 S.E. 96, 97 (1935); *Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873, 876 (1936); *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W.2d 251, 259 (1937); *Vilas v. Iowa State Bd. of Assess. & Review*, 223 Iowa 604, 273 N.W. 338, 342 (1937); *Oursler v. Tawes*, 178 Md. 471, 13 A.2d 763, 768 (1940); *California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959); and *Burns v. State Bureau of Revenue*, 79 N.M. 53, 439 P.2d 702, 706 (1968).

This split of authority evident within the state cases also manifests itself in the federal appellate courts. For example, in the First Circuit it is difficult to determine the meaning of the 16th Amendment because in *United States v. Turano*, 802 F.2d 10, 12 (1st Cir. 1986), that court held that the "16th Amendment eliminated the indirect/direct distinction as applied to taxes on income." Next door in the Second Circuit, there is uncertainty revealed by three completely inconsistent cases. In *Jandorf's Estate v. Commissioner*, 171 F.2d 464, 465 (2nd Cir. 1948), that court declared, "It should be noted that estate or inheritance taxes are excises ... while surtaxes, excess profits and war-profits taxes are direct property taxes." Surtaxes are the graduated taxes of the income tax, so this court holds that the personal income tax is a direct tax. But in *Ficalora v. Commissioner*, 751 F.2d 85, 87 (2nd Cir. 1984), that court stated that the personal income tax is an indirect tax: "[T]he Supreme Court explicitly stated that taxes on income from one's employment are not direct taxes and are not subject to the necessity of apportionment." But compare *United States v. Sitka*, 845 F.2d 43, 46 (2nd Cir. 1988)(citing *Parker*, *infra*, for the proposition that the tax is direct). In the Third Circuit, it has been held in one case that all income taxes are direct, but in another that only some are direct; see *Keasbey & Mattison Co. v. Rothensies*, 133 F.2d 894, 897 (3rd Cir. 1943)("[A]n income tax is a direct tax upon income therein defined"); and *Penn Mutual Indemnity Co. v. Commissioner*, 277 F.2d 16, 19 (3rd Cir. 1960)("Pollock only held that a tax on the income derived from real or personal property was so close to a tax on that property that it could not be imposed without apportionment. The Sixteenth Amendment removed that barrier").

In the remainder of the Circuits, the difference of opinion as to whether the federal income tax is a direct or indirect tax is likewise as profound and confusing. In the Fourth and Sixth Circuits, the income tax has been held to be an excise tax; see *White Packing Co. v. Robertson*, 89 F.2d 775, 779

² The dissent in this case noted the wide divergence of the authority as to whether the tax is a direct property tax or an excise. It commented: "The disagreement of the courts and judges on identical problems seems to afford the highest proof that 'reasonable doubt' does exist," 25 P.2d, at 89-90.

(4th Cir. 1937)("The tax is, of course, an excise tax, as are all taxes on income..."); and *United States v. Gaumer*, 972 F.2d 723, 725 (6th Cir. 1992)("Brushaber and the Congressional Record excerpt do indeed state that for constitutional purposes, the income tax is an excise tax"). However, in the Fifth, Seventh, Eighth and Tenth Circuits, arguments that this tax is an excise have been squarely rejected and determined to be frivolous. For example, in *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir. 1984), the court clearly rejected the contention that this tax is an excise:

"The Supreme Court promptly determined in *Brushaber*... that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax.

"The sixteenth amendment merely eliminates the requirement that the **direct income tax** be apportioned among the states.

"The sixteenth amendment was enacted for the express purpose of providing for a **direct income tax.**"

In *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986), the court held that an argument that this tax was an excise was frivolous on its face ("The power thus long predates the Sixteenth Amendment, which did no more than remove the apportionment requirement..."). A similar conclusion was reached in *United States v. Francisco*, 614 F.2d 617, 619 (8th Cir. 1980), that court declaring that *Brushaber* held this tax to be a direct one:

"The cases cited by Francisco clearly establish that **the income tax is a direct tax**, thus refuting the argument based upon his first theory. See *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 19, 36 S.Ct. 236, 242, 60 L.Ed. 493 (1916) (the purpose of the Sixteenth Amendment was to take the income tax 'out of the class of excises, duties and imposts and place it in the class of direct taxes')".³

Finally, in *United States v. Lawson*, 670 F.2d 923, 927 (10th Cir. 1982), that court expressed in the following fashion its contempt for the contention that the federal income tax was an excise:

"Lawson's 'jurisdictional' claim, more accurately a constitutional claim, is based on an argument that the Sixteenth Amendment only authorizes excise-type taxes on income derived from activities that are government-licensed or otherwise specially protected... The contention is totally without merit... The Sixteenth Amendment removed any need to apportion income taxes among the states that otherwise would have been required by Article I, Section 9, clause 4."

Therefore, while the Supreme Court rejected in *Baltic* the argument that "the 16th Amendment authorized only an exceptional direct income tax without apportionment," this position now prevails in the Fifth, Seventh, Eighth and Tenth Circuits. In the Second Circuit, the existing authority illogically claims that the tax is both.

³ It is interesting to note that this court relied upon those portions of the *Brushaber* decision quoted previously where the Court noted the argument it was precisely rejecting. If the judges who are legal scholars are capable of completely misunderstanding this opinion, is it not also probable that the American people and even lawyers can make the same mistake?

A direct tax applies to and taxes property while an indirect, excise tax is never imposed on property but usually an event such as sales; see *Bromley v. McCaughn*, 280 U.S. 124, 50 S.Ct. 46, 47 (1929).⁴ Those courts which hold that an income tax is a direct property tax believe that income is property, yet those which hold that this tax is an excise declare that income is not property. If the courts of this nation cannot identify what is the nature of this ephemeral item known as income,⁵ then how can the American people? While in *Critzer* the difference of opinion existed between two government agencies, here the difference of opinion is among many different courts, a situation far more serious than that presented in *Heller*. Aren't Americans being subjected to a monumental due process problem far bigger than that to which Mrs. Critzer was subjected?

The question of what constitutes property is an issue governed by state law; see *Aquilino v. United States*, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 1280 (1960), and *United States v. Baldwin*, 575 F.2d 1097, 1098 (4th Cir. 1978). The definition of the term, "property," is very broad; see *Samet v. Farmers' & Merchants' Nat. Bank*, 247 F. 669, 671 (4th Cir. 1917)("Property is everything that has exchangeable value or goes to make up a man's wealth"). It includes money, credits, evidences of debt, and choses in action; see *State v. Ward*, 222 N.C. 316, 22 S.E.2d 922, 925 (1942). Income is property according to *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1301 (8th Cir. 1980). Accrued wages and salaries are likewise property; see *Sims v. United States*, 252 F.2d 434, 437 (4th Cir. 1958), *aff'd.*, 359 U.S. 108, 79 S.Ct. 641 (1959); and *Kolb v. Berlin*, 356 F.2d 269, 271 (5th Cir. 1966). Accounts receivable are property; see *In re Ralar Distributors, Inc.*, 4 F.3d 62, 67 (1st Cir. 1993). Even private employment and a profession are considered property; see *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975).

There appears to be no dispute about the plain requirements of the Constitution that direct taxes must be apportioned and that indirect taxes must be uniform. Likewise as shown above, there is a line of decisional authority regarding the generally accepted proposition that income is property, although there are courts which deny this. In *James v. United States*, 970 F.2d 750, 755, 756 n. 11 (10th Cir. 1992), the Tenth Circuit made it clear that income is property. Pursuant to *United States v. Lawson*, *supra*, the Tenth Circuit declares that the property known as income is subject to tax under the view that the 16th Amendment eliminated the apportionment requirement for a specific class of property known as income. However, there is ample contrary judicial authority which demonstrates that this construction of the 16th Amendment is erroneous and that the purpose, intent and meaning of the amendment was the opposite construction and that the amendment did not free this one type of property tax from the regulation of apportionment. An error in a logical argument involving a single premise affects the ultimate conclusion. If the Tenth Circuit accepted the proposition that the meaning of the 16th Amendment was contrary to that asserted in *Lawson*, but adhered to its decision in *James*, a valid legal argument would logically follow that property known as income could not be taxed because the current income tax is not apportioned.

This same problem, but from an opposite perspective, is evident within the Fourth Circuit where the existing authority of *Sims v. United States*, *supra*, declares that income is property. Since that Circuit holds that the federal income tax is an excise via *White Packing Co. v. Robertson*, *supra*, and

⁴ The Court defined these two types of taxes in the following manner: "While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct.... a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned..."

⁵ At least one court has declared that the term "income" is not defined in the Internal Revenue Code; see *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir. 1976).

since the definition of an excise tax appearing in that Court's opinion in *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989), excludes a tax on property, does it not logically follow that there is a tremendous gap in the decisional authority within the Fourth Circuit which presents a view of the law that the property known as income might not be taxed? Based on these cases, is this tax clearly imposed?

Review of the above noted authority in other circuits and states only demonstrates how profound this problem is. In the Sixth Circuit, *United States v. Gaumer*, supra, declares the income tax to be an excise; via *Jack Cole Co. v. MacFarland*, 337 S.W.2d 453, 455-56 (Tenn. 1960), the Tennessee Supreme Court has held that an excise tax cannot be used to tax the right to earn a living. Which authority do the people living in Tennessee follow? If they follow the word of their own state court, they might be charged with a tax crime, yet they have a right to rely upon the word of the courts, even when erroneous; see *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987). A different problem emerges in the Eighth Circuit where *United States v. Francisco*, supra, holds that an income tax is a direct property tax. Missouri is within the Eighth Circuit, but the Missouri Supreme Court held in *Ludlow-Saylor Wire Co. v. Wollbrinck*, supra, that an income tax is an excise; if income is not property under Missouri state law,⁶ then how does this federal property tax operate as to this "non-property"? Iowa is also in the Eighth Circuit, but in *Hale v. Iowa State Board of Assessment and Review*, 223 Iowa 321, 271 N.W. 168, 172 (1937), that court held that "income is not property within the law of taxation." If state law holds that income is not property yet the federal appellate court for the same state holds the exact opposite, is not a serious uncertainty of the law, due process problem clearly evident?

The decisional authority within the Fifth Circuit, *Parker v. Commissioner*, supra, holds that this tax is a direct property tax, but a contrary view prevails in Mississippi where its citizens are told that an income tax is an excise; see *Hattiesburg Grocery Co. v. Robertson*, supra. The courts in Wisconsin and Indiana, via *State v. Frear*, supra, and *Miles v. Dept. of Treasury*, supra, have found this tax to be an excise, yet the federal appellate court which encompasses these two states has an entirely different view of the object of the tax; see *Coleman v. Commissioner*, supra. The Tenth Circuit, which sits in Denver, held in *Lawson*, supra, that the income tax is a property tax, yet a state court in the same city has declared that such a tax is an excise; see *California Co. v. State*, supra.

In Alabama, income is property via *Eliasberg Bros. Mercantile Co. v. Grimes*, supra; but next door in Georgia via *Featherstone v. Norman*,⁷ it is not. While the Eleventh Circuit appears not as yet to have passed upon the question of what type of tax the federal income tax is, consultation of Supreme Court decisions still doesn't resolve the question. By following the rationale of *Brushaber* and *Bromley*, supra, which declare the federal income tax to be an excise tax which is not imposed on property, are the people of Alabama exempt from this tax while those in Georgia are not? But by reversing the choice of Supreme Court decisions to follow in an effort to resolve this controversy merely changes the results but not the problem. By following *Eisner* which seems to hold that the tax is imposed on property, do the people of Alabama owe the tax while those in Georgia do not? These differing conclusions plainly reveal a serious uncertainty about what is taxed, and no attempt is made

⁶ The Court in *Ludlow*, 205 S.W. at 198, declared that income is not property: "It is apparent therefore, that when the Constitution of 1875 was adopted, the word 'property' as the basis for taxation, proportioned to value, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue."

⁷ See 153 S.E. at 65: "Hence a man's income is not 'property' within the meaning of a constitutional requirement that taxes shall be laid equally and uniformly upon all property within the State."

here to offer any explanation for all of this inconsistency, other than to note that this uncertainty of the law creates a serious due process problem.

The problems created by the failure of American courts to determine what is the nature of an income tax are very broad. Any particular federal tax must fit within one of the two constitutional tax categories and once the category is known, it may be determined whether the tax in question complies with the constitutional regulation for imposition of that type of tax. A direct tax which is uniformly imposed would still be unconstitutional as one imposed in the absence of apportionment. An indirect tax imposed via apportionment would likewise be unconstitutional since it would not be uniform. But if it is impossible to determine which class any given tax falls within, then it is likewise impossible to determine which constitutional regulation, if any, applies to that tax. If the courts of this nation hold that an income tax is both an excise tax and a direct one, it cannot with any degree of certainty be determined what constitutional restrictions might or might not apply to this tax or what is even the meaning of the 16th Amendment. What's more, it cannot be determine what is income, whether property or non-property.

But this is not the only fundamental problem for the federal income tax. Additionally, the question of which statute controls the duty to file income tax returns is subject to judicial dispute. In *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 222, 64 S.Ct. 511, 513 (1944), the Court noted that §54 of the 1939 Internal Revenue Code, the predecessor for Internal Revenue Code §6001, related to the filing requirement; see also *Updike v. United States*, 8 F.2d 913, 915 (8th Cir. 1925). In *True v. United States*, 354 F.2d 323, 324 (Ct.Cl. 1965), *United States v. Carlson*, 260 F.Supp. 423, 425 (E.D.N.Y. 1966), *White v. Commissioner*, 72 U.S.T.C. 1126, 1129 (1979), *McCaskill v. Commissioner*, 77 U.S.T.C. 689, 698 (1981), *Counts v. Commissioner*, 774 F.2d 426, 427 (11th Cir. 1985), *Blount v. Commissioner*, 86 U.S.T.C. 383, 386 (1986), and *Beard v. Commissioner*, 793 F.2d 139 (6th Cir. 1986), these courts held that Internal Revenue Code §6011 related to the filing requirement. In *United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980), *United States v. Dawes*, 951 F.2d 1189, 1192, n. 3 (10th Cir. 1991), and *United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991), those courts held that Internal Revenue Code §§ 6011 and 6012 governed this duty. In contrast, the cases of *Steinbrecher v. Commissioner*, 712 F.2d 195, 198 (5th Cir. 1983), *United States v. Bowers*, 920 F.2d 220, 222 (4th Cir. 1990), and *United States v. Neff*, 954 F.2d 698, 699 (11th Cir. 1992), held that only §6012 governed this duty. But in *United States v. Pilcher*, 672 F.2d 875, 877 (11th Cir. 1982), none of the above sections were mentioned and it was held that §7203 required returns to be filed. It is very apparent that there is even a diversity of opinion among judges regarding which sections of the Internal Revenue Code govern the requirement to file income tax returns.

The observation of the dissenting judge in *Culliton v. Chase*, 25 P.2d at 89-90, that this "disagreement of the courts and judges on identical problems seems to afford the highest proof that 'reasonable doubt' does exist," is particularly appropriate here. If American courts cannot decide such fundamental questions as what is the nature of the income tax and which section of the Internal Revenue Code requires the filing of an income tax return, then it is obvious that a serious due process problem exists within the federal income tax laws.

If American courts cannot decide such fundamental questions as what is the nature of the income tax and which section of the Internal Revenue Code requires the filing of an income tax return, then it is obvious that the problem with this tax involves these basic questions. Since even the courts are split over these questions, shouldn't we just scrap the whole thing since the condition which exists is incapable of repair?

In 1913 during the debate on the first income tax act under the 16th Amendment, Senator Elihu Root commented about the complexity of that first law:

"I guess you will have to go to jail. If that is the result of not understanding the Income Tax Law I shall meet you there. We shall have a merry, merry time, for all of our friends will be there. It will be an intellectual center, for no one understands the Income Tax Law except persons who have not sufficient intelligence to understand the questions that arise under it."⁸

Apparently, nothing has changed.

⁸ See The United States Tax Court: An Historical Analysis, page 12, by Harold Dubroff. Published by CCH.