The Fifth Circuit Court Of Appeals' Evasion In *Parker v. Comm'r*,

IN RESPONSE TO APPELLANT Alton Parker's contention on appeal that, "the IRS and the government in general, including the judiciary, mistakenly interpret the sixteenth amendment as allowing a direct tax on property (wages, salaries, commissions, etc.) without apportionment," the 5th Circuit appellate panel says:

> "The Supreme Court promptly determined in Brushaber v. Union Pacific Ry. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916), that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax."

Parker v. Comm'r, 724 F.2d 469 (5th CA, 1984)

However, going straight to the words of the *Brushaber* court itself-- we find that the unanimous Supreme Court says *exactly the opposite* of the misrepresentation by the *Parker* court:

> *"We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it..."*

Brushaber v. Union Pacific R. Co., 240 U.S. 1 (1916)

After generalizing the many contentions advanced in argument to support the erroneous conclusion that the 16th Amendment provides for a power to levy an income tax which is both direct and not subject to the regulation of apportionment, the *Brushaber* court goes on to point out that the very suggestion of a non-apportioned direct tax is idiotic (okay, they don't use "idiotic"...), because that would cause:

> *"...one provision of the Constitution [to] destroy another; that is, [it] would result in bringing the provisions of the Amendment [supposedly] exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned."*

Ibid.

Contemporary expert commentary on the *Brushaber* decision emphasizes the fact that it actually says the opposite of the bizarre and incorrect declaration of the *Parker* court:

> *"The Amendment, the [Supreme] court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong."*

Cornell Law Quarterly, 1 Cornell L. Q. 298 (1915-16)

> *"In Brushaber v. Union Pacific Railroad Co., Mr. C. J. White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is "indirect," rather than as making an exception to the rule that direct taxes must be apportioned."*

Harvard Law Review, 29 Harv. L. Rev. 536 (1915-16)

...as do later expert statements on the subject:

> *"The income tax... ...is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the*

tax; it is the basis for determining the amount of tax."

...and,

"[T]he amendment made it possible to bring investment income within the scope of the general income-tax law, but did not change the character of the tax. It is still fundamentally an excise or duty..."

Treasury Department legislative draftsman F. Morse Hubbard in Congressional testimony in 1943

"The Supreme Court, in a decision written by Chief Justice White, first noted that the Sixteenth Amendment did not authorize any new type of tax, nor did it repeal or revoke the tax clauses of Article I of the Constitution, quoted above. Direct taxes were, notwithstanding the advent of the Sixteenth Amendment, still subject to the rule of apportionment..."

Legislative Attorney of the American Law Division of the Library of Congress Howard M. Zaritsky in his 1979 Report No. 80-19A, entitled 'Some Constitutional Questions Regarding the Federal Income Tax Laws'

Twenty years after *Brushaber*, the Supreme Court reiterates its unequivocal holding that the 16th Amendment did NOT authorize a "direct, non-apportioned tax" of any kind or on anything in dismissing an argument that a federal tax on "income" (in this case under the provisions of the Social security act) can be construed as a direct non-apportioned tax:

"If [a] tax is a direct one, it shall be apportioned according to the census or enumeration**. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. Burnet v. Brooks, 288 U. S. 378, 288 U. S. 403, 288 U. S. 405; Brushaber v. Union Pacific R. Co., 240 U. S. 1, 240 U. S. 12 Whether the [income] tax is to be classified as an "excise" is in truth not of critical importance [for purposes of this analysis]. If not that, it is an "impost", or a "duty". **A capitation or other "direct" tax it certainly is not."

Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 548 (1937) (Emphasis added.)

SO, THE 5th CIRCUIT'S declaration in *Parker* is a blatant misrepresentation in response to Alton Parker's contention that "the IRS and the government in general, including the judiciary, mistakenly interpret the sixteenth amendment as allowing a direct tax on property (wages, salaries, commissions, etc.) without apportionment." The *Brushaber* court says the *exact opposite* of the false statement to which the circuit court resorts in lieu of an actual rebuttal of Parker's contention, and does so in no uncertain terms-- a fact universally recognized and repeated over subsequent decades by every possible authority.

724 F2d 469 Parker v. Commissioner of Internal Revenue

Alton M. PARKER, Sr., Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 83-4300
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 6, 1984.

Alton M. Parker, Sr., pro se.

Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Section, Gilbert S. Rothenberg, Michael J. Roach, Attys., Tax. Div., Dept. of Justice, Washington, D.C., for respondent-appellee.

Appeal from the Decision of the United States Tax Court.

Before GEE, POLITZ and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

1

Alton M. Parker was employed in 1977 as a pilot by Putz Aerial Services, Inc., from which he received $40,114.97 in wages. In addition, he received $5,569.06 in taxable pension income from the United States Air Force and $2,225.10 in long-term capital gains. Parker had previously filed valid and complete tax returns, but his 1977 return contained only his name, address, social security number and signature. The income and deduction portions of Parker's 1040 and 1040X Forms contained only asterisks or the entry "none" or "object, self-incrimination." Parker did not provide the information essential to a determination of tax liability but attached to his protest return excerpts from cases and other materials discussing the fifth amendment privilege against self-incrimination.

2

The Commissioner determined a tax deficiency of $14,250.04 and assessed a penalty under Sec. 6653 (a) of the IRC, 26 U.S.C. Sec. 6653(a), for negligent or willful refusal to file an appropriate tax return. Parker sought the Tax Court's review of the Commissioner's decision. At trial, he conceded unreported income from wages, pension benefits, and long-term capital gains, but challenged the

Commissioner's allowances for rental losses and medical expenses. He also opposed the penalty. The Tax Court upheld the Commissioner's determinations, including the imposition of the penalty. Finding no error of fact or law we affirm.

3

Parker claims that the Commissioner allowed inadequate deductions for rental loss and medical expenses. In support of his position he testified: "I have no idea what ... [the repairs to rental property] cost me.... I paid medical expenses, but I can't tell you what amount at this time." The findings of the Commissioner carry a presumption of correctness and the taxpayer has the burden to refute them. Welch v. Helvering, 290 U.S. 111, 54 S.Ct. 8, 78 L.Ed. 212 (1933). The Tax Court found that Parker failed to carry this burden. We agree.

4

The Tax Court referred to two facts to uphold the penalty assessment. First, the Court noted that Parker had filed proper tax returns in previous years. This, coupled with Parker's obvious intelligence, negated the argument that Parker had a reasonable belief in the validity of his fifth amendment assertion. We agree.

5

Parker maintains that "the IRS and the government in general, including the judiciary, mistakenly interpret the sixteenth amendment as allowing a direct tax on property (wages, salaries, commissions, etc.) without apportionment." As we observed in Lonsdale v. CIR, 661 F.2d 71 (5th Cir.1981), the sixteenth amendment was enacted for the express purpose of providing for a direct income tax. The thirty words of this amendment are explicit: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." The Supreme Court promptly determined in Brushaber v. Union Pacific Ry. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916), that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax.

6

Appellant cites Brushaber and Stanton v. Baltic Mining Co., 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546 (1916), for the proposition that the sixteenth amendment does not give Congress the power to levy an income tax. This proposition is only partially correct, and in its critical aspect, is incorrect. In its early consideration of the sixteenth amendment the Court recognized that the amendment does not bestow the taxing power. The bestowal of such authority is not necessary, for as the Court pointedly noted in Brushaber:

7

The authority conferred upon Congress by Sec. 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation ... that there was authority given ... to lay and collect income taxes.

8

240 U.S. at 12-13, 36 S.Ct. at 239-240. The sixteenth amendment merely eliminates the requirement that the direct income tax be apportioned among the states. The immediate recognition of the validity of the sixteenth amendment continues in an unbroken line. See e.g. United States v. McCarty, 665 F.2d 596 (5 Cir.1982); Lonsdale v. CIR.

9

Appellant cites Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911), in support of his contention that the income tax is an excise tax applicable only against special privileges, such as the privilege of conducting a business, and is not assessable against income in general. Appellant twice errs. Flint did not address personal income tax; it was concerned with corporate taxation. Furthermore, Flint is pre-sixteenth amendment and must be read in that light. At this late date, it seems incredible that we would again be required to hold that the Constitution, as amended, empowers the Congress to levy an income tax against any source of income, without the need to apportion the tax equally among the states, or to classify it as an excise tax applicable to specific categories of activities.

10

Parker next maintains that he has a constitutional right to trial by jury. We addressed this issue in Mathes v. CIR, 576 F.2d 70, 71 (5th Cir.1978), and held:

11

The seventh amendment preserves the right to jury trial "in suits at common law." Since there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States. [Citations omitted.] Thus, there is a right to a jury trial in actions against the United States only if a statute so provides. Congress has not so provided when the taxpayer elects not to pay the assessment and sue for a redetermination in the Tax Court. For a taxpayer to obtain a trial by jury, he must pay the tax allegedly owed and sue for a refund in district court. 28 U.S.C. Secs. 2402 & 1346(a)(1). The law is therefore clear that a taxpayer who elects to bring his suit in the Tax Court has no right, statutory or constitutional, to a trial by jury.

12

Finally, Parker maintains that the Tax Court is improperly constituted because its judges, holding office for 15 years, 26 U.S.C. Sec. 7443(e), are not appointed for life as are Article III judges. From this he argues that decisions by the Tax Court are constitutionally void. This argument also is devoid of merit. Congress created the Tax Court by its authority vested in Article I. The statutes establishing the Tax Court are constitutional. Melton v. Kurtz, 575 F.2d 547 (5th Cir.1978).

13

In the foregoing we have addressed and disposed of issues which were not timely raised in the Tax Court and which ordinarily would not be considered upon review. Pokress v. CIR, 234 F.2d 146 (5th Cir.1956). In this case the pressing need to marshal limited judicial resources justifies a slight variance from the rule. By addressing these issues we seek to avoid further purposeless litigation and appeal.

14

The absence of a semblance of merit in any issue raised in appellant's appeal mandates a repeat of the warning we gave in Lonsdale v. CIR, 661 F.2d at 72, concerning the very claims raised in this case:

15

Appellants' contentions are stale ones, long settled against them. As such they are frivolous. Bending over backwards, in indulgence of appellants' pro se status, we today forbear the sanctions of Rule 38, Fed.R.App.P. We publish this opinion as notice to future litigants that the continued advancing of these long-defunct arguments invite such sanctions, however.

16

Our warning has been ignored. We now invoke the sanctions of Fed.R.App.P. 38 and assess appellant with double costs. This time we do not award damages but sound a cautionary note to those who would persistently raise arguments against the income tax which have been put to rest for years. The full range of sanctions in Rule 38 hereafter shall be summoned in response to a totally frivolous appeal.

17

AFFIRMED.