

A Brief Discussion Of What "Income" In The Income Tax Law Means, And Why

First, one must remember that the Constitution provides that:

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

United States Constitution, Article 1, Section 9

Then, one must understand that the 16th Amendment brought nothing under the taxing power that had not been taxable as "income" before:

"The provisions of the Sixteenth Amendment conferred no new power of taxation . . ."

United States Supreme Court, *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916)

"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..."

United States Supreme Court, *Peck v. Lowe*, 247 U.S. 165 (1918)

"The legislative history merely shows... ..that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable. 45 Cong. Rec. 2245-2246 (1910); id., at 2539; see also Brushaber v. Union Pacific R. Co., 240 U.S. 1, 17 -18 (1916)."

United States Supreme Court, *South Carolina v. Baker*, 485 U.S. 505 (1988)

And, it has to be understood that the income tax has ALWAYS been an excise tax-- that is, an indirect tax:

"I hereby certify that the following is a true and faithful statement of the gains, profits, or income of _____, of the _____ of _____, in the county of _____, and State of _____, whether derived from any kind of property, rents, interest, dividends, salary, or from any profession, trade, employment, or vocation, or from any other source whatever, from the 1st day of January to the 31st day of December, 1862, both days inclusive, and subject to an income tax under the excise laws of the United States:"

(from the first income tax return form);

"The income tax is, therefore, not a tax on income [earnings] as such. It 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."

F. Morse Hubbard, Treasury Department legislative draftsman. House Congressional Record March 27th 1943, page 2580;

"...in Springer v. U. S., 102 U.S. 586 , it was held that a tax upon gains, profits, and income was an excise or duty, and not a direct tax, within the meaning of the constitution, and that its imposition was not, therefore, unconstitutional."

United States Supreme Court, *Pollock v. Farmer's Loan & Trust*, 158 U.S. 601, 1895;

"...taxation on income was in its nature an excise entitled to be enforced as such,"

United States Supreme Court, *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916), quoting and reiterating language used in its ruling in *Pollock v. Farmer's Loan and Trust* as part of the passage below, to which I have added a few bracketed explanatory notes to help the reader get through Chief Justice White's lengthy sentences:

"...the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent

[that is, allowing the federal government to lay taxes directly on the citizenry],

in which case the duty would arise to disregard form

[any denomination or window-dressing of the tax as merely an "income" tax, something well-established by long practice and statutory and case law to mean only an excise on gains proceeding from federally-connected activities]

and consider substance alone

[a structuring of the tax in such a fashion as to actually make it function as a capitation or other direct tax regardless of name or form-- the practical reality perceived by the Pollock court in regard to the 1894 act],

and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from

[federally-licensed and civil-service-- see the discussion of "privilege" and "non-privileged" below, and www.losthorizons.com/appendix.htm#professions]

'professions, trades, employments, or vocations', its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past."

(Regarding the Pollock case and the 16th Amendment: The Pollock court said that a tax on dividends (and other property-ownership-related receipts) was NOT an "income" tax, legally, but actually a "property" tax, which thus had to be apportioned, because of the intimate relationship of the receipts with the underlying property from which they are derived. All the 16th Amendment did was to sever that "derivation relationship", allowing those receipts to be taxed by the "income" excise along with everything else which was, and always had been, taxable thereby.

Remember, the "income" tax was conceived and instituted during the Lincoln administration, 51 years before the 16th Amendment. It was then administered and collected for more than a decade, before being temporarily suspended in 1873. That is, the "income" tax operated for some 11 years in the latter part of the 19th century-- surviving Supreme Court scrutiny in the case of *Springer v. United States*, 102 U.S. 586 (1880)-- WITHOUT apportionment, and WITHOUT the benefit of a "16th Amendment". Clearly, such an amendment was not needed, and did not serve, to make a tax on "income" Constitutional. Such a tax had always been Constitutional, because it has never been, and still is not, a capitation or other direct tax-- due to the meaning of "income". Again, the 16th Amendment did nothing but undo the Pollock court's doctrine, which had sheltered "income" derived from property from the tax.)

Continuing with the Brushaber ruling:

"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..."

...

"But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned."

...which was nicely summarized by Howard M. Zaritsky, Legislative Attorney, American Law Division of the Library of Congress, in Report No. 80-19A, entitled "Some Constitutional Questions Regarding The Federal Income Tax Laws", page CRS-5 (1979):

"The Supreme Court, in a decision written by Chief Justice White [the Brushaber ruling], 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 and indirect taxes were still subject to the rule of uniformity."

**So, we can forget the 16th entirely (for purposes of general consideration of the tax),
and we must remember excise...**

"So the [16th] 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 with respect to the privilege of carrying on any activity or owning any property which produces income."

F. Morse Hubbard, Treasury Department legislative draftsman. House Congressional Record March 27th 1943, page 2580;

"The terms "excise tax" and "privilege tax" are synonymous. The two are often used interchangeably."

American Airways v. Wallace 57 F.2d 877, 880;

...the requirement to pay such [excise] taxes involves the exercise of privilege."

United States Supreme Court, Flint vs. Stone Tracy Co. 220 U.S. 107 (1911);

...privilege...

"PRIVILEGE: A particular benefit or advantage enjoyed by a person, company, or class beyond the common advantages of others citizens. An exceptional or extraordinary power of exemption. A particular right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others."

Black's Law Dictionary, 6th Ed.;

...and what DOESN'T qualify as privilege:

"The right to follow any of the common occupations of life is an inalienable right..."

It has been well said that 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.'

United States Supreme Court, Butcher's Union Co. v. Crescent City Co., 111 U.S. 746 (1883);

"Included in the right of personal liberty and the right of private property- partaking of the nature of each- is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property"

United States Supreme Court, Coppage v. Kansas, 236 U.S. 1 (1915);

...the essence of all of which is underscored here:

'Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.'

United States Supreme Court, Knowlton v. Moore, 178 U.S. 41 (1900), quoting the long-standing official French definitions as helpfully illustrative of the distinctions drawn in the United States Constitution.

In pointing out that a tax on the exercise of a right is a direct tax, these definitions also express the fact that only the exercise of a privilege could qualify as an indirect-taxable event, exchange, or other activity (and thus be applied without apportionment). The fact that the event, etc. might be identical in every other respect to one occurring without the involvement of privilege is immaterial.

For instance, working, and being paid for doing so, is every person's right, and therefore not an indirect-taxable activity. On the other hand, working for, and being paid by, the federal government is a privilege (obviously, no one has an unalienable right to a federal job...), and IS indirect-taxable, even though the work done might otherwise be the same in each case. The same is true of investing and receiving dividends, or of any other kind of economic or remunerative activities.

**To summarize what we have seen so far:
Only Activities Involving The Exercise Of Privilege Can Qualify As The "Income" Taxed
Under The Non-Apportioned "Income Tax"**

(By the way,

"And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person", as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Revised Statutes, Title XXXV, Internal Revenue, section 3140.

So, the law does not distinguish between a business and an individual person, neither specifically within the internal revenue statutory structure, nor in general. The right to contract AS a worker is the same as the right to contract WITH a worker-- whether as a property owner hiring a plumber, or as a sole proprietor, partnership, corporation etc. hiring workers. Indeed, under the law generally, a business which has any independent legal status-- that is, status of its own, apart from that of the natural persons who own it-- is considered to BE a "person" in every commercially- and contractually-related respect.)

* * *

Now, Let's Look At The Subject From Another Angle

Start out by remembering once again that,

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

United States Constitution, Article 1, Section 9;

...and then examining what 'capitation' means:

A Bit More On The Subject Of Capitation

(from the CtC [Digital Appendix](http://www.losthorizons.com/appendix.htm) at www.losthorizons.com/appendix.htm)

CAPITATION, A poll tax; an imposition which is yearly laid on each person according to his estate and ability. 2. The Constitution of the United States provides that "no capitation, or other direct tax, shall be laid, unless in proportion to the census, or

enumeration, therein before directed to be taken." Art. 1, s. 9, n. 4. See 3 Dall. 171; 5 Wheat. 317. Bouvier's Law Dictionary, 6th Edition (1856).

There is a persistent misunderstanding among the non-CtC-educated about the meaning of the "capitation" which is prohibited (other than by apportionment) in the United States Constitution. A good deal of this misunderstanding can be attributed to a classic "garbage in/garbage out" exercise, in which "capitation" comes to be defined as a "poll tax", which in turn is often misunderstood to mean "voting tax".

For instance, the entire definition of "capitation" offered by Black's Law Dictionary (fifth edition) is as follows:

A poll tax (q.v.). A tax or imposition upon the person. It is a very ancient kind of tribute, and answers to what the Latins called "tributum", by which taxes on persons are distinguished from taxes on merchandise, called "vectigalia".

Turning to the definition of "poll tax" in the same collection, we find:

A capitation tax; a tax of a specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class (as, all males of a certain age, etc.) without reference to his property or lack of it.

Poll taxes as a prerequisite to voting in federal elections are prohibited by the 24th Amendment and as to state elections such were held to be unconstitutional in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed2d 169.

So, if one has made no study of this subject, but relies on Black's for one's sense of it, one might conclude that a "capitation" can be read as a "poll tax" (that is, a fixed, class-based levy), which is itself likely to be misunderstood to mean a "voting tax"-- that is, a tax taken at the polling place before the right to vote can be exercised.

However, a capitation is NOT simply a "poll tax" (in fact, it would be proper to say that a "poll tax" is merely a variety of capitation), and a "poll tax" is not a "voting tax". Nonetheless, since most (including many legal professionals), have never made a study of this subject, sloppy presentations in prominent sources such as the one we have just examined have muddied the subject enough to make "capitation" a cognitive 'hiccup' term. Far too many who encounter the term, even while poring over the language of our fundamental law, simply skim past with no registration of its meaning or import.

So, just to clear up or forestall such confusion, I offer the following relevant observations of a couple of fellows who were pretty inarguably in a position to know what they were talking about:

"The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be

considered as indirect taxes."

From Alexander Hamilton's argument in the Hylton case (quoted in his son's 1851 publication of Hamilton's writings). Note the lack of a comma after "capitation.

"The taxes which, it is intended, should fall indifferently upon every different species of revenue, are capitation taxes,"... "Capitation taxes, if it is attempted to proportion them to the fortune or revenue of each contributor, become altogether arbitrary. The state of a man's fortune varies from day to day, and without an inquisition more intolerable than any tax, and renewed at least once every year, can only be guessed at."... "Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes."... "In the capitation which has been levied in France without any interruption since the beginning of the present century, the highest orders of people are rated according to their rank by an invariable tariff; the lower orders of people, according to what is supposed to be their fortune, by an assessment which varies from year to year."

Adam Smith, *The Wealth of Nations*, Book V, CH. II, Art. IV (which can be found in its entirety on the [Companion CD](#))

(Bear in mind that Smith is using the common word 'wages', not the custom-defined legal term "wages" found in the modern revenue laws.)

"In the different poll-taxes which took place in England during the reign of William III the contributors were, the greater part of them, assessed according to the degree of their rank; as dukes, marquisses, earls, viscounts, barons, esquires, gentlemen, the eldest and youngest sons of peers, etc. All shopkeepers and tradesmen worth more than three hundred pounds, that is, the better sort of them, were subject to the same assessment, how great soever might be the difference in their fortunes. Their rank was more considered than their fortune. Several of those who in the first poll-tax were rated according to their supposed fortune were afterwards rated according to their rank. Serjeants, attorneys, and proctors at law, who in the first poll-tax were assessed at three shillings in the pound of their supposed income, were afterwards assessed as gentlemen. In the assessment of a tax which was not very heavy, a considerable degree of inequality had been found less insupportable than any degree of uncertainty."

Ibid.

('Income' is also used in its everyday meaning in this excerpt-- that is, as 'earnings'. Smith pre-dated the evolution of specialized revenue-law-terms such as "wages" and "income" by more than a century.)

(I'm sure everyone noticed that a poll tax sometimes took the form of an assessment of *"three shillings in the pound of [someone's] supposed income (earnings)"*. As such taxes *are* of the class of *"capitation[s] or other direct taxe[s]"*, Smith's observation here nicely supplements the language in his more general definition of capitations by which it is made clear that Article 1, Section 9 of the Constitution prohibits any tax claiming some part of *"every species of revenue"* (except by means of apportionment); and that, therefore, the "specie of revenue" addressed by our "income" tax is, of necessity, a distinct one-- that is, one amenable exclusively to an indirect form of taxation, meaning a privilege-based excise.)

"...Albert Gallatin [Pennsylvania congressman, United States Senator and Representative, United States Minister to England and France, respectively, and the longest serving

Secretary of the Treasury in American History -PH], *in his Sketch of the Finances of the United States, published in November, 1796, said: 'The most generally received opinion, however, is that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people;...' He then quotes from Smith's Wealth of Nations, and continues: 'The remarkable coincidence of the clause of the constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes-- an acceptance of the word peculiar, it is believed, to Dr. Smith-- leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from the falling immediately on the revenue;...'*

United States Supreme Court, *Pollock v. Farmer's Loan & Trust*, 157 U.S. 429 (1895)

To summarize this portion of the exercise:

A Tax On Revenue, Particularly As Either A Fixed Or Percentage-Calculated Levy On Earnings, Is A Capitation

So,

since

- The "income" taxable under the non-apportioned "income tax" **must** be something that can be taxed as, and only as, an excise (a tax on the proceeds of the exercise of a privilege);

and

- The "income" being taxed **cannot** be something such that a tax upon it would constitute a capitation (a tax on general, unprivileged receipts or earnings);

...even without looking at a word of the income tax law itself, we can see that the "income" upon which it lays a tax doesn't include unprivileged earnings, receipts, pay, or profits-- because it cannot.

Thus, it is no surprise to find that when we DO look at the words of the law, we find that they entirely conform to this limitation. For instance, look at the definitions of the two key reporting-related terms in the law, the application of one or the other of which underlies all presumptions of income tax liability:

Sec. 3401. - Definitions

a) Wages

For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer,

...

c) Employee

For purposes of this chapter, the term "employee" [includes](#) an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation [A "United States Corporation", defined in Sec. 207 of the Public Salary Tax Act as, "a corporate agency or instrumentality, is one (a) a majority of the stock of which is owned by or on behalf of the United States, or (b) the power

to appoint or select a majority of the board of directors of which is exercisable by or on behalf of the United States..." However, we are instructed by the IRS in Pub. 15A that such officers are only to be considered "employees" if they are paid as a consequence of their positions.]

("FICA" provisions are similarly defined, but in a more complex fashion, which would require an unreasonable amount of space to include here. See [CtC](#) for details.)

and:

Sec. 7701. - Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

Trade or business

The term "trade or business" [includes](#) the performance of the functions of a public office

(Narrower versions of this definition, specifying only certain public offices, are deployed in regard to certain aspects of the tax, such as that involving "self-employment income". See [CtC](#) and [The Digital Appendix](#) for more on this.)

Clearly, the law's own words confine its application within the limits that our discussion above has identified. (Close study of ALL of the law reveals that it NEVER seeks to escape these limits, even though much of its language, when excerpted and seen out of-- or in ignorance of-- the broad context of the law, can appear otherwise-- a fact that is widely and shamefully exploited by the beneficiaries of misunderstanding. See '[Cracking the Code- The Fascinating Truth About Taxation In America](#)' for that close study, a more comprehensive specification of what qualifies as "income", and everything else most Americans need to know about the "income" tax.)

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