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**ORIGINAL**

NO: 19A179

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IN THE SUPREME COURT OF THE UNITED STATES

Gerald Nelson  
Petitioner,

Supreme Court, U.S.  
OCT 17 2019

OFFICE OF THE CLERK

V.

Commissioner of Internal Revenue

Respondent,

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATE COURT OF APPEALS  
FOR THE SECOND CIRCUIT COURT

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PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

## LIST OF ALL PARTIES

X all parties appear in

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## QUESTIONS PRESENTED

1. 26 U.S.C 61 (a) , defines Gross income means all income from whatever source derived. **Question:** If gross income ,includes back pay settlements that deduct taxpayer's Unemployment Benefits in an Arbitration Award,who Is the tax payer , the employee or the employer, when the United States Supreme Court says it should not be deducted ?

2. Due Process Claims and Section 1983. In relevant part , the Fourteenth Amendment prohibits any state from depriving any person of life ,liberty, or property, without due process of law.Procedural due process addresses the right to notice and hearing before or after particular deprivation can take place. **Question:** Whether in forma pauperis applicant's fourteenth amendment rights are violated ,when taxpayer's Unemployment settlement tax case , is dismissed on appeal without a hearing or opportunity to be heard.

## ORDERS BELOW

The Second Circuit issued an order on February 22, 2019 denying poor person application and dismissing appeal. The Second circuit denied a rehearing motion for reconsideration on May 20, 2019. United States Tax Court, Memorandum Findings of Facts and Opinion, United States Tax Court Motion to Vacate.

## JURISDICTION

This courts jurisdiction is invoked under 28 U.S.C. 1254 (1). Justice Ruth Bader Ginsburgh extended the time to and including October 17, 2019.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1915 (E), 26 U.S.C CODE 61 61 (a), Fourteenth Amendment.

26 U.S Code 7491.

## STATEMENT OF THE CASE

This situation is not the first time Gerald Nelson (“Nelson”), has ask this Court for a Certiorari , concerning the back pay agreement ,made by his union and company. This time the IRS, bases a notice of deficiency on the back pay agreement. Nelson would like to again state, he was never made whole by this agreement and the unemployment should have never been deducted. The IRS Judge was presented with evidence , showing who had the unemployment money. But refused to acknowledge, what the back pay agreement actually said and meant. Nelson understands that this Court does not like cases that are fact based cases. But the law is settled in this area, At least according to these two cases, 1.NLRB v. Gullet Gin Co. 340 U.S. 361 (1951), 2. Marshall Field & Co. v. National Labor Relations Board, 200 F.2d 375 (7th Cir. 1953). This is the highest Court in the Country,Nelson is simply asking the Justices of this Court to read the back pay agreement, it clearly states the union and the local took the unemployment money. Yes Nelson received the unemployment, but the back

pay agreement took it from Nelson. The settlement was never reported to the IRS.

Nelson has been saying this for the last 3 yrs, that the back pay agreement was fraudulent. Nelson has been trying to get a trial with all parties in the back pay Agreement. So the union and the local can explain where the Government's money and Nelson unemployment money went, since Nelson doesn't have it and the settlement was not reported to the Government. The United States Court of Appeals ("Court of Appeal") , denied Nelson leave to appeal to proceed in forma pauperis and dismissed the appeal based on it lacks an arguable basis either in law or in fact. The case law used by the Court of appeals was *Neitzke v. Williams*, 490 U.S 319,325 (1989), 28 U.S.C 1915 (e).

Nelson case and appeal does have merits ,because the United States Supreme Court ("Supreme Court") has stated that unemployment is not a deductible in a back pay agreement. How can it be gross pay in a tax cases, when the back pay settlement was never even reported. However, Nelson was never given a chance to try to explain this to the Court of Appeal , because his Appeal was dismissed. Nelson did present a poor person application, that showed he qualified under this status, The Court of Appeals did not elaborate on what was not arguable in Nelson case or what did not have merits..

## **BACKGROUND HISTORY**

### **A. BACK PAY AGREEMENT AND CHECK**

1. Nelson is currently employed as a Paratransit driver for MV Transportation. Nelson is on workers comp. And awaiting an arbitration ,due to MV Transportation unwilling to let him work as a bus operator again.
2. This case stems from Nelson prior termination on March 6, 2014, for a So called preventable accident involving a pedestrian. Nelson challenged his termination, and it was ultimately submitted to final and binding arbitration under The collective bargaining agreement (“CBA”) between MV and the Union. On June 30, 2014 , Arbitrator Elliot Shriftman (“Arbitrator”) issued a decision(“the Award”), ruling thatNelson shall be reinstated forthwith and made whole.”
3. MV and the ATU Union Local 1181-1061,AFL-CIO (“Union”) jointly Requested the Arbitrator to clarify how to calculate Nelson’s back pay, the make whole part of the Award.
4. On August 28, 2014, the Arbitrator issued a Supplemental decision (“the Supplemental Award”), holding that:

Back pay is a term of art and means the amount the employee would have earned had he/she not been discharged less what the employee did earn. Where an employee receives income from any source that is in any way related to the loss of employment that amounts constitute a deduction in the calculation of a make whole remedy.

5. On September 5, 2014, not in accordance with the arbitration award, and without the informed signed consent of Nelson, Jessica D. Ochs ESQ. attorney for local 1181-1062 ATU, and MV Transportation independently entered into a back pay agreement to pay a settlement amount 11,933.40, Less applicable taxes and pay roll deductions. The back pay agreement reads as follows:

This Agreement is entered into by local 1181,ATU ("Local 1181"or"the Employer") collectively referred to herein as ("the parties").

1. On June 30, 2014 , Arbitrator Elliot Shriftman issued an award in which He found that MV did not have just cause to discharge Gerald Nelson and order that {Nelson} shall be reinstated forthwith and made whole.
2. On August 27,2014, the Arbitrator issued a supplemental award clarifying how back pay may be calculated.
- 3.. MV reinstated Nelson in and around July 1, 2014.
4. The parties want to avoid the further delay and expense of arbitrating the amount of back pay owed Nelson.
5. MV shall pay Nelson within ten (10) calendar days the sum of \$11,933.40, less applicable taxes and other payroll deduction in full settlement of his arbitration case, deduction shall be made in the most favorable manner to The employee permitted by law. The gross amount due Nelson represents gross backpay owed for the approximately 21 weeks Nelson was out of work (\$18,404.40), less \$6,471.00 that Nelson received from New York State in unemployment benefits.
6. In the event that Nelson is required by New York State to repay any amount of the unemployment compensation because of his reinstatement, the Company shall reimburse him for such amounts as he may be required to repay.

7. The parties agree and acknowledge that the terms of this Agreement contain a full resolution of all matters pertaining to Nelson's employment or his termination from employment with MV.

8. The parties agree that any dispute over the interpretation or application of this Agreement shall be submitted to Arbitrator Elliot Shriftman for Binding arbitration as soon as practicable.

Signed by Mitch Phantor and Jessica D. Ochs , Dated 9/5/2015.

6. Thereafter , on September 12, 2014, MV Transportation issued a settlement Check in the amount of \$5,837.80. However the check did not have the unemployment benefits money stated in any of the deduction on the check, nor did It mention unemployment benefits at all.

## **B. TAX COURT HISTORY**

7. On or around February 27, 2017 , Nelson received a Notice of Deficiency , stating that the deficiency was 1,418. The Notice had ,Empire Film Services, and New York State Department of Labor as the two parties ,stating Nelson did not report the two parties on the tax return of 2014.

8. Nelson petition the tax court for a trial and poor persons status, both were granted by the Tax Court.

9. Nelson complied totally with Internal Revenue Service (“IRS”) Office of Chief Counsel. Nelson even ask for a pre-trial conference, to try and explain everything to the Tax Judge, before trial. But the Tax Judge denied the request.

10. The Chief Counsel for the IRS requested for admissions , Nelson replied on April 10, 2018. It should be noted, all the way up to trial Nelson had been speaking to Chief counsel for the IRS. It was the IRS that told Nelson, it was a possibility there might be fraud involved, but it was not his department that handled fraud. Nelson did not speak to much about Empire films , who were mentioned in the Notice of Deficiency, because I’m really not sure who they are.

11. On May 14, 2018, Nelson and the IRS went to trial before Judge Lauber At New York, NY. Nelson was told to give Chief Counsel for the IRS documents pertaining to the case. Nelson submitted the documents to Chief Counsel , hoping that this would solve the issue of why the unemployment was unreported. Nelson entered all the documents into the record, by producing them to the Judge. Nelson was introduced to a stipulation , but when Nelson crossed certain things out on the stipulation, Chief Counsel for the IRS did not want to sign.

12. Judge Lauber ruled against Nelson on June 28, 2018, On August 6, 2018 Nelson filed a Motion to Vacate the decision , it was also denied .

### **C. THE COURT OF APPEALS ORDERS**

13. On October 5, 2018, Nelson filed a Notice of Appeal , in responds to the Tax Court Decision.

14. On October 18, 2018, Nelson filed a motion to proceed in forma pauperis on the Appeal.

15. On February 22, 2019 , the Court of Appeals denied motion to proceed in forma pauperis and dismissed the appeal.

16. On April 11, 2019 , Nelson filed a Motion for Reconsideration in responds to Appeal being dismissed.

17. On May 20, 2019, the motion for reconsideration was considered and denied.

18. The IRS did not oppose or answer in the above proceedings at the Court of Appeals.

### **REASON FOR GRANTING THE PETITION**

### **D. NESON's CASE DOES HAVE MERITS**

19. The IRS ' Determination in a notice of deficiency are generally presumed correct, and the tax payer bears the burden of proving them erroneous.Nelson produced Credible evidence in accordance with 26 U.S Code 7491 (a).Nelson

presented the Back pay agreement, Arbitration award, and the check stub, to link the union and MV Transportation to the unreported taxes, Helvering v. Taylor, 293 U.S 507(1953). Neitzke v. Williams, 490 U.S. 319 (1989), was applied to Nelson's appeal without any opportunity for Nelson to be heard. The Court of Appeals uses 28 U.S. 1915 (e), but does not identify the section that applies to Nelson. Section (a), should not apply, because Nelson's in forma pauperis application is true. Nelson is asking this court to use its supervisory powers in this case considering that ,Nelson has produced evidence , and his case has merits, to reinstate his appeal.

**I. THE TAX COURT DECISION CONFLICTS WITH UNITED STATES SUPREME COURT DECISIONS.**

20. In NLRB v. Gullett Gin Co., 340 U.S. 361 (1951) the Supreme Court affirmed the NLRB's decision not to deduct unemployment compensation payments from a back pay award. obtained from a employer.The Supreme Court rejected the argument that such refusal permitted a double recovery for the plaintiffs, and hence , need not be deducted as the Court explained: To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employee more than whole

21. In Helvering v. Taylor, 293 U.S 507 (1935), states “ where a taxpayer shows Before the Board of tax Appeals that a tax is arbitrarily assessed and excessive, his relief from payment of it is not conditional upon his showing also the correct amount of tax or that none was assessable.”

**II. THE TAX COURT DECISION CONFLICT WITH CIRCUIT COURTS**  
**ON UNEMPLOYMENT SETTLEMENTS THAT DEDUCT**  
**UNEMPLOYMENT BENEFITS.**

22. The 8th Gaworski v. ITT Commercial Fin. Corp. 17 F.3d 1104 1114 (8th Cir. 1994); Craig v. Y & Y Snacks, Inc., 721 F. 2d 77, 82 thru 84 (3d Cir. 1993); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550 thru 51 (11th Cir. 1983); Kaufman v. Sidereal Corp., 695 F. 2d 343,346 thru 47 (9th Circuit); EEOC v. Ford Motor Co. , 645 F.2d 183at 195 thru 196 (4 Cir. 1981).

**III. THE COURT OF APPEALS VIOLATED NELSON'S FORTEENTH**  
**AMENDMENT RIGHTS OF DUE PROCESS AN ACCES TO THE**  
**COURTS.**

23. Nelson's Unemployment benefits have been taken from him in a settlement that was not reported to the IRS. The IRS is now asking Nelson's to pay taxes on this settlement that was not reported.

Nelson is being asked to pay taxes on Unemployment that never should have been taken, according this Court. Some form of hearing is required before an individual is finally deprived of property or liberty interest. This procedural due process was held in *Goldberg v. Kelly* ,397 U.S. 254 (1970) . Nelson's appeal, if granted by this Court on reversal ,does not lack an arguable bases either in law or fact .

**IV. THIS CASE PRESENTS THE RECURRING QUESTION OF**  
**EXCETIONAL IMPORTANCE WARRANTING THIS COURTS**  
**RESOLUTION.**

24. What is gross income pursuant to 26 U.S.C 61 (a), according to this case, the Tax Court states it means all income from whatever source derived, including unemployment compensation. But why would a taxpayer (Nelson) report something he believes should not have been taken from him ? National Labor Relations Board v. Gullett Gin Co.,inc 340 U.S. 361 (1951). The National Labor Board say no to unemployment being deducted, the District Courts according to Second Circuit Court of Appeals, are left to do what they want , *Promisel v. First America* 943 F.2d 251.258 (1991). The Circuit Courts are split on the deduction of unemployment being deducted from a settlement. The Tax Court link the taxpayer

to unemployment , without accepting proof of the settlement being presented, with evidence that the taxpayer does not have the money and settlement don't state who would pay the taxes. The question needs to be answered by the United States Supreme Court ,because Administrative agencies,District Courts,Courts of Appeals,Tax courts , all say something different,When it comes to unemployment on being deducted from a back pay settlement, and ultimately the innocent taxpayerIs responsible for paying the taxes on something that was not permitted over a Century ago, NLRB v. Gullet Gin Co. Inc. 340 U.S. 361. Is a taxpayer responsible for back pay settlement of unemployment benefits pursuant to 26 US. 61 (a) gross income, if he has presented proof he is not responsible for the taxes ?

**THIS COURT SHOULD REVERSE THE COURT OF APPEALS ORDER**

25. The Court of Appeals order below, conflicts with Supreme Court decision, Court appeals decisions and violates Nelson Fourteenth Amendment rights.

**CONCLUSION**

**The petition for Writ of Certiorari should be granted.**

**Respectfully Submitted**

Classie Duckery  
Dated : October 17, 2019

Subscribed and sworn to before me  
this 17<sup>th</sup> day of October 2019  
Classie Duckery  
Notary Public