Appendix

[DO NOT PUBLISH]

In the United States Court of Appeals For the
Eleventh Circuit

No. 21-11576
Non-Argument Calendar

BRIAN D. SWANSON,

Petitioner-Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Petition For Review of a Decision of the
U.S. Tax Court
Agency No. 6837-20

Before LAGOA, BRASHER, and BLACK, Circuit Judges.

PER CURIAM:

Brian Swanson, a taxpayer proceeding pro se, appeals from the U.S. Tax Court's order determining that he owed $19,578 in income tax because of a deficiency from 2017. The Commissioner of the Internal Revenue Service (Commissioner), in turn, moves for summary affirmance of the Tax Court's order and for sanctions against Swanson in the amount of $8,000. Alternatively, the Commissioner moves to suspend briefing while the motion for summary affirmance is pending. We will address the Commissioner's motion for summary affirmance first, followed by the motion for sanctions.

I.

Summary disposition is appropriate, in part, where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is

frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[1]

The Constitution prohibits the imposition of direct taxes unless they are apportioned according to the census. U.S. Const. Art. I, § 9, cl. 4. A "direct tax" is one levied directly on property because of its ownership, while an "indirect tax" is levied on the "use" of property. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 14 (1916). However, the Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. amend. XVI (emphasis added). In *Brushaber*, the Supreme Court recognized that the Sixteenth Amendment authorizes a direct, non-apportioned income tax upon United States citizens throughout the country. *See Brushaber*, 240 U.S. at 12-19. Specifically, the Supreme Court explained that the Sixteenth Amendment's purpose was to relieve income taxes, although they were direct taxes, from the apportionment requirement and from consideration of the source of the income. *Id.* at 18-19.

Accordingly, arguments "that wages are not taxable income . . . . have been rejected by courts at

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[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

all levels of the judiciary and are patently frivolous." *Stubbs v. Comm'r of Internal Revenue Serv.*, 797 F.2d 936, 938 (11th Cir. 1986). For example, we have specifically held as frivolous the following arguments:

> that [taxpayers'] wages are not income subject to tax but are a tax on property such as their labor; that only public servants are subject to tax liability; [and] that withholding of tax from wages is a direct tax on the source of income without apportionment in violation of the Sixteenth Amendment . . . .
> *Motes v. United States*, 785 F.2d 928, 928 (11th Cir. 1986).

Consequently, in a nonbinding, unpublished opinion in another appeal by Swanson, we concluded that the argument he raised in that appeal — that his salary was not taxable as income — was frivolous under our precedent. *Swanson v. United States*, 799 F. App'x 668, 670 (11th Cir. 2020) (unpublished).

Here, Swanson raises a different argument, that the federal income tax is unconstitutional because it is a direct tax without apportionment. Nevertheless, it, too, is frivolous under our precedent. *See Motes*, 785 F.2d at 928. The Supreme Court has held the Sixteenth Amendment authorizes a direct, non-apportioned income tax upon United States citizens. *See Brushaber*, 240 U.S. at 12-19. Consequently, Swanson's argument his employment earnings are excluded from his gross income because

the Constitution does not allow for direct, non-apportioned taxes to be imposed on taxable income is foreclosed in light of *Brushaber*. *See id.*

Therefore, because Swanson's appeal is frivolous, we GRANT the government's motion for summary affirmance. See *Groendyke Transp., Inc.*, 406 F.2d at 1162.

II.

Federal Rule of Appellate Procedure 38 allows a court of appeals, after a separately filed motion and reasonable opportunity to respond, to award damages and single or double costs to an appellee if the court determines that the appeal is frivolous. Fed. R. App. P. 38. Although we generally prefer that the government establish its costs and attorney's fees by affidavit, we have previously granted the government's motion for lump sum sanctions in the interest of judicial economy. See, e.g., *King v. United States,* 789 F.2d 883, 884-85 (11th Cir. 1986); see also *Stubbs*, 797 F.2d at 938-39. We explained that "this procedure is [in the Petitioner's] interest since he would be liable for the additional costs and attorney's fees incurred during any proceedings on remand." *King*, 789 F.2d at 884-85.

Additionally, we have previously warned Petitioners seeking to argue that their wages are not taxable income "that they may be expected to have sanctions imposed against them if they continue to raise these sorts of frivolous contentions." *Hyslep v. United States,* 765 F.2d 1083, 1084-85 (11th Cir.

1985). In fact, in the unpublished opinion in Swanson's previous appeal, we concluded that Rule 38 sanctions were appropriate because (1) Swanson's arguments were frivolous, and (2) he had been warned about their frivolity through our precedent and the district court's express statement that his position was frivolous. *Swanson*, 799 F. App'x at 671-72. Accordingly, we granted the government's motion and awarded a lump sum of $8,000 in sanctions. Id. at 672. Further, we have previously granted the government's motion for lump sum sanctions of $8,000 in another frivolous tax appeal. See *Herriman v. Comm'r of Internal Revenue Serv.*, 521 F. App'x 912, 914 (11th Cir. 2013) (unpublished).

As discussed above, Swanson's arguments in this appeal have already been held to be frivolous. As to whether his pursuit of this appeal warrants sanctions, Swanson was previously sanctioned for raising similar frivolous arguments. *See Swanson*, 799 F. App'x at 671-72. Similarly, the Tax Court expressly warned him that his position was frivolous when denying his motion for summary judgment. In light of these warnings, particularly his previous appeal, Rule 38 sanctions are appropriate.

Thus, we GRANT the government's motion for sanctions and award $8,000 in sanctions. Accordingly, we DENY all pending motions and petitions as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIAN D. SWANSON,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 21-11576-DD
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee	)	

APPELLEE'S MOTION FOR
SUMMARY AFFIRMANCE AND FOR SANCTIONS

Brian D. Swanson appeals from the final order and decision of the United States Tax Court determining a $19,578 income tax deficiency for the year 2017. His sole reason for disputing the determination is his belief that the income tax violates the U.S. Constitution. Mr. Swanson's theory and his appeal plainly lack merit because they distort the Constitution and ignore binding precedent. The Court should summarily affirm the Tax Court's order and decision and award appellate sanctions against Mr. Swanson.

STATEMENT OF THE CASE

On July 10, 2020, Mr. Swanson filed a petition in the Tax Court challenging a notice of deficiency issued to him for 2017 by the Internal Revenue

Service. (Doc. 1 at 1-2.)[2] Relevant here, Mr. Swanson disputed that he owed any income tax on the nearly $78,000 he had earned that year as a schoolteacher. (See Doc. 1 at 2, 5-6; see also Doc. 3at 2, 5 (amended petition).)

Mr. Swanson did not dispute the amount of salary he had earned in 2017 nor the calculation of tax owed on his wages. (See generally Doc. 1 (petition); Doc. 3 (amended petition); Doc. 5 (Mr. Swanson's motion for summary judgment); Doc. 8 (Mr. Swanson's reply in support of his motion for summary judgment); Doc. 27 at 3, ¶ 3 (first joint stipulation of facts).) Instead, Mr. Swanson contended that the tax on his income was unconstitutional because Federal income taxes are directly and uniformly collected, and "[n]either [t]he Constitution nor the Sixteenth Amendment authorize any 'direct tax' collected by the rule of uniformity." (Doc. 5 at 6; see also id. at 3-10; Doc. 3 at 2-5; Doc. 8 at 3-4.) See U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ; but all Duties, Imposts and Excises shall be uniform throughout the United States."); id. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein directed to be taken.").

Mr. Swanson moved for summary judgment on that basis (among other grounds not pertinent here).

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[2] "Doc." refers to documents in the original record on appeal as numbered by the Clerk of the United States Tax Court (and to the page numbers within those documents). "Br." refers to Mr. Swanson's opening brief. "I.R.C." refers to the Internal Revenue Code of 1986 (26 U.S.C.).

(See Doc. 5; Doc. 8.) The Tax Court rejected his theory and denied his motion. (Doc. 10.) In doing so, the court found "[his] arguments that neither the Constitution nor the Sixteenth Amendment authorize[s] a direct non-apportioned Federal income tax to be frivolous and groundless." (Id. at 3.) The court also warned Mr. Swanson that it might sanction him if he continued to "advance frivolous and groundless arguments." (Id. (discussing I.R.C. § 6673(a)(1)).)

Mr. Swanson renewed his constitutional theory at trial. (See Doc. 24 at 4-11 (Mr. Swanson's pretrial memorandum); Doc. 55 at 31-37, 52, 54-55, 60, 98-99 (trial transcript).) The Tax Court roundly rejected the argument again, explaining in a bench opinion that it "fails to account for the Sixteenth Amendment[.]" (Doc. 52 at 12.) Although the court ultimately declined to impose sanctions against Mr. Swanson under I.R.C. § 6673 (given his success on other disputed issues), the court observed that he "ha[d] continued to advance his frivolous constitutional argument, or some variation of it, even after being warned in [the] Order denying his motion for summary judgment[.]" (Id. at 16.)

The Tax Court entered its final order and decision on April 20, 2021. (Doc. 54.) Mr. Swanson timely appealed on May 6, 2021. (Doc. 56.) See I.R.C. § 7483. This Court has jurisdiction. See I.R.C. § 7482(a)(1).

ARGUMENT

I. The Court should summarily affirm the Tax Court's determination of Mr. Swanson's 2017 tax liability

Summary affirmance is warranted when "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis,* 406 F.2d 1158, 1162 (5th Cir. 1969); see also 11th Cir. R. 42-4. Mr. Swanson's appeal hinges on a single question: Whether the imposition of income tax on his teacher's salary in 2017 is unconstitutional because it amounts to a non-apportioned and uniform direct tax. (See, e.g., Br. 4, 7, 18.) The Tax Court found no constitutional defect and repeatedly deemed Mr. Swanson's theory frivolous—and rightly so.

First, Congress may freely impose direct taxes on income without regard to apportionment. *See Brushaber v. Union Pac. R. Co.*, 240 U.S.1, 17-18 (1916). The Sixteenth Amendment empowers Congress 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." U.S. Const., amend. XVI. Thus, even if the income tax is a direct tax, the Sixteenth Amendment overrides Article I's command that direct taxes "shall [not] be laid, unless in Proportion to the Census[.]" Id. art. I, § 9, cl. 4. Arguments to the contrary are frivolous. See *Motes v. United States*, 785 F.2d 928, 928 (11th Cir. 1986) (per curiam) (rejecting, as frivolous, argument "that withholding of tax from wages is a direct tax on the source of the income without apportionment in violation of the Sixteenth Amendment"); *Herriman v. Commissioner*, 521 F. App'x 912, 913 (11th Cir. 2013) (per curiam); *In re Becraft*, 885 F.2d 547, 548-49 (9th Cir. 1989); *Lonsdale v. Commissioner*, 661 F.2d 71,

72 (5th Cir. 1981) (per curiam); ; I.R.S. Notice 2010-33, ¶ III(9)(j), 2010-17 I.R.B. 609.

Second, Mr. Swanson fails to show any constitutional uniformity problem. (See Br. 5, 11, 15.) For starters, no provision of the Constitution forbids uniformity when imposing taxes. Rather, Article I's uniformity clause simply directs that certain taxes—i.e., "all Duties, Imposts and Excises"—must "be uniform throughout the United States[.]" U.S. Const., art. I, § 8, cl. 1. Moreover, the Uniformity Clause "exacts only a geographical uniformity[.]" *Brushaber,* 240 U.S. at 24 (emphasis added); see also *Knowlton v. Moore,* 178 U.S. 41, 108 (1900). So long as "Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied." *United States v. Ptasynski,* 462 U.S. 74, 84 (1983). The disputed income tax here is not geographically defined, and Mr. Swanson has never contended otherwise. He thus marshals yet another "argument[] that ha[s] been rejected as frivolous[.]" *Buchbinder v. Commissioner,* 60 T.C.M. 1421, 1990 WL 199911, at *2 (Dec. 13, 1990) (denying, "without further comment," the theory "that the income tax violates the uniformity clause"); accord *Pledger v. Commissioner,* 641 F.2d 287, 289 n.6 (5th Cir. 1981) (agreeing that "the progressive taxation scheme of the income tax" would satisfy "Article I, Section 8," if it were "not appropriate under the Sixteenth Amendment," because "the tax is uniform").

II. The Court should impose sanctions

"Federal Rule of Appellate Procedure 38 allows a court of appeals. . . to award damages and single or double costs to an appellee if the court determines that the appeal is frivolous." *Swanson v. United*

States, 799 F. App'x 668, 671 (11th Cir. 2020) (per curiam). For the reasons above, this appeal is frivolous. This is also not the first time Mr. Swanson has deployed frivolous arguments in attempting to evade the income taxes owed on his salary in 2017. Just last year, this Court awarded $8,000 in sanctions against him for pressing the "frivolous position" that his wages earned in 2016 and 2017 were not taxable as "income." Id. at 671-72. And here, as before, Mr. Swanson was repeatedly "forewarned about the frivolity of his position" before taking a frivolous appeal. Id. at 672. The Court should therefore award $8,000 in sanctions in this case to deter future similar conduct.

CONCLUSION

The Tax Court's order and decision should be summarily affirmed, and the Court should award $8,000 in sanctions against Mr. Swanson.

Respectfully submitted,

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