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## Taggart: Cost Justification

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## RECENT BOOKS

**COST JUSTIFICATION.** By *Herbert F. Taggart*. Ann Arbor: The University of Michigan, Bureau of Business Research, School of Business Administration. 1959. Pp. xvii, 588. \$12.50.

The growing impact of the Robinson-Patman Act on the business world is now an established trend. The observer may view developments with dismay, or perhaps with a measure of inner satisfaction, but the importance of this statutory amendment to the Clayton Act cannot be gainsaid. One of the mysteries of the act which is only slowly being unraveled is the extent to which sellers can rely on the cost justification proviso of section 2 (a) as a basis for differentiating in prices charged customers. It is with such cost justification that the present volume is concerned.

The volume is an extremely important contribution to the field and is the product of a special comprehensive study by a distinguished accountant and teacher. It analyzes all of the cases that are of public record which have presented cost accounting issues under the statute, and does so from the accountant's point of view. While some might think that accountants would best be served by a study of its pages, in all likelihood the lawyers will find the volume equally helpful as a point of reference. This necessarily is so since, in providing guidance in this difficult area, the functions of attorney and accountant are complementary; neither alone has the full measure of skill and experience to counsel businessmen in what may be vital policy decisions.

Professor Taggart's study is the only compilation of its kind which endeavors to make a complete historical review of the accounting aspects of the cost justification defenses thus far attempted. One of the author's recurrent themes, however, is the difficulty in using any of this learning as precedent, although he obviously is aware that a full appreciation of these cases is valuable in determining the proper scope of an accounting study usually needed to succeed. Of the some twenty-seven cases reviewed, all but three had their origin in Federal Trade Commission proceedings. The thesis of the author—and one not without foundation—is that, the essential ingredient of success before the commission is to convince the agency's staff accountants of the validity of the cost accounting study offered by way of justification of price differences. He feels that in this endeavor the FTC staff will not be bound by what it has approved before, since the accounting techniques employed may be suitable only because of a combination of special circumstances. But to say that the staff will not be bound is not to resolve the value of the precedents, and incidentally the usefulness of the book beyond its recordation of history. What may not be legally binding can nevertheless be persuasive and can create both at the staff and commission levels a climate of reasonableness with respect to sticky points on which controversy may have centered.

Moreover, the cost justification issues under the Robinson-Patman Act which have originated in FTC proceedings have not been subjected to

extensive scrutiny by the courts. Many of such proceedings have not resulted in appeals, or on appeal have principally been concerned with other issues. Since judges are precedent-minded, any challenge to the administrative decision as having been unduly critical of a "good faith" effort at cost justification must suggest for the judicial tribunal some standard of acceptability as a norm.

One way of partially meeting that burden is by expert testimony. But, assuming equally strong and skilled accounting opinions on either side of the controversy, where else can light be found? One source is the Report to the Federal Trade Commission of its Advisory Committee on Cost Justification, filed in February, 1956, the chairman of which has authored the present volume.\* However, this Report, which is set forth in full as an appendix to the volume, has neither been approved nor disapproved by the commission. Another source is the body of precedent which expresses administrative practice since passage of the act in 1936. The aptness of the precedent cited must be evaluated, but the desirability of having some source of experience to look to cannot be discarded.

Whether we wish or not, however, a continued body of precedent of this sort is not apt to emanate from future FTC proceedings. The reason for that is the growing practice of receiving accounting studies *in camera* because of their confidential nature. The respondent's counsel is not endeavoring to add to the general fund of knowledge—he is trying to win a case without exposing the intimate details of his client's business for general observation. The commission counsel are appreciative of the sensitive nature of such data and generally agree that exhibits may be offered under seal, or that only controversial portions of the study need be offered at all. One may even surmise that the agency staff derive some comfort in not having placed on record accounting techniques and elections which they have approved, but which may complicate their lives in future proceedings. With this tendency to dry up future pragmatic demonstrations of what will or will not "wash" at the commission, all the practitioner can do is relish what material is already at hand.

Professor Taggart's volume, while focusing on accounting matters, necessarily occasionally wanders into questions of law. This has produced surprisingly few inaccuracies. The author's basic feeling is that legal procedures are not the best way to resolve disputes as to proper cost accounting. This is of course the fundamental reason why consultation with FTC accountants should not be shut off even in cases which are actively being litigated. After a period of agency hesitancy, this apparently coincides with current FTC thinking. But in an imperfect world, occasions will continue to arise when the ultimate resolution of cost justification issues will be for the commission and the courts. Here the ultimate decision must be by lawyers and not by accountants, unless the deciding tribunal abdicates its

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\* For a detailed commentary on this Report, see Shniderman, "Cost Justification Under the Robinson-Patman Act: the FTC Advisory Committee's Report," 25 UNIV. CIN. L. REV. 389 (1956).

function. It is to be hoped that the lawyer-judges and lawyer-commissioners will be as adequately informed as possible on accounting aspects. This is the responsibility of the lawyer-advocates, who do their clients a distinct disservice if they abdicate their function as to these matters because they regard them as "technical." The proper approach for educating the agency and the courts as to the relevant issues must be evolved, with the assistance of the accountant, by the legal practitioner.

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