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ATTORNEYS -TAXATION - UNAUTHORIZED PRACTICE OF INCOME TAX LAW BY CERTIFIED PUBLIC ACCOUNTANTS

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COMMENTS

ATTORNEYS—TAXATION — UNAUTHORIZED PRACTICE OF INCOME TAX LAW BY CERTIFIED PUBLIC ACCOUNTANTS—The accepted law in the United States is that laymen may not engage in the practice of law.¹

¹ Rules determining who may engage in the practice of law are made by the judiciary and supplemented in some states by acts of the legislatures; both have consistently authorized only lawyers to practice law. *In re Opinion of Justices*, 289 Mass. 607, 194 N.E. 313 (1935); 39 N.Y. Consol. Laws (McKinney, 1944) § 270, under which unauthorized practitioners are prosecuted; *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919) (advertising that one was in business of drafting legal papers held illegal); *In re Levine*, 210 App. Div. 8, 205 N.Y.S. 589 (1924) (use of a lay solicitor prohibited). Protection of the public is the primary consideration in these cases. See *New York County Lawyers' Assn. v. Standard Tax & Management Corp.*, 181 Misc. 632, 43 N.Y.S. (2d) 479 (1943); *People v. Lawyers' Title Corp.*, 282 N.Y. 513, 27 N.E. (2d) 30 (1940).

However, the enigma of what constitutes the practice of law has plagued laymen, lawyers and the courts for many years.² Attempts to find the answer have engendered intense friction between various professional groups, each arguing that its jurisdiction extends further than the other admits. The greatest animosity has developed between lawyers and certified public accountants in the dispute as to their respective functions in the income tax field.³

Coals were thrown recently on this burning issue by a New York court in the case of *In re Bercu*.⁴ The facts were these: the Croft company of New York City owed sales tax to the City for the years 1936, 1937 and 1938. In 1943, the company's earnings were considerable, and the management felt this would be a good year in which to compromise the municipal tax claim, if the sum paid to the City could be deducted from gross income in 1943. Since the company kept its books on the accrual basis, its own attorney-accountant advised that a deduction could be made properly only in the year in which the tax claims accrued. Bercu, a certified public accountant consulted by the company, was in complete disagreement with this conclusion. He examined a score or more tax decisions, the code and the regulations in an effort to substantiate his position. In his research, Bercu found a regulation which he felt was authority for his stand on the question, and he so advised the company. When Bercu later sued the company to recover \$500 for services rendered, the court denied his claim on the ground that he was engaged in the unauthorized practice of law. There was no appeal from this decision, but the New York County Bar Association then petitioned the court to hold Bercu in contempt of court for illegally practicing law. The petition was dismissed on the merits in the lower court.⁵ On appeal, the decision was reversed.⁶ Bercu was fined \$50 for being in contempt

² For definitions of the practice of law and collections of cases, see 151 A.L.R. 781 (1944); 125 A.L.R. 1173 (1940); BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937); HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934). A good case summary is found in *Detroit Bar Assn. v. Union Guardian Trust Co.*, 282 Mich. 216, 276 N.W. 365 (1937). For further references, see the comprehensive collection in 56 YALE L.J. 1438 at 1439, note 1, and 1444, notes 23 and 24 (1947). However, most courts recognize the difficulty of precise definition: *Lowell Bar Assn. v. Loeb*, 315 Mass. 176, 52 N.E. (2d) 27 (1943); *In re Shoe Manufacturers' Protective Assn.*, 295 Mass. 369, 3 N.E. (2d) 746 (1936); *People ex rel. Atty. Gen. v. Jersin*, 101 Colo. 406, 74 P. (2d) 668 (1937).

³ 56 YALE L.J. 1438 at 1440, note 3 (1947).

⁴ 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1948).

⁵ Bercu's action against the Croft Company for \$500 was in the Municipal Court of New York City (unreported). The original action by the New York County Bar Association is reported in 188 Misc. 406, 69 N.Y.S. (2d) 730 (1947); noted in 56 YALE L.J. 1438 (1947).

⁶ 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1948), one judge dissenting.

of court and was enjoined from engaging in similar practices thereafter. The case is now before the New York Court of Appeals.⁷

In the light of existing law with respect to an accountant's engaging in the practice of law, it seems clear that Bercu was engaged in unauthorized legal practice. But regardless of the specific outcome of the *Bercu* case, the central issues involved are worthy of close attention by members of both professions who are interested in finding a solution to the perplexing problem of dividing the functions of lawyers and certified public accountants in the income tax field, if indeed there should be any division. The scope of this comment is limited to discussion of tax consultation practice and avoids such clearly legal functions as arguing tax cases before courts of record.

A. *What Is The Practice Of Law?—The Lawyers' Position*

Laymen who unlawfully engage in the practice of law subject themselves to criminal prosecution, quo warranto, injunction or punishment for contempt.⁸ With such a threat to their freedom of action, it is necessary that there be a clear definition of what activities are forbidden to non-lawyers. Although most cases agree that the practice of law includes more than merely appearing in court,⁹ attempts to formulate an all-inclusive definition have been unsuccessful. Alleged definitions range from the absurdly general¹⁰ to attempted lists of specific functions.¹¹ The consensus is that the practice of law consists of giving legal advice which requires any degree of legal knowledge or skill. Concerning income taxation, the Unauthorized Practice Committee of the American Bar Association asserts that the practice of law includes giving advice on

⁷ A letter from counsel for Mr. Bercu indicates the case will be argued in May, 1949.

⁸ 100 A.L.R. 236 (1936) (criminal prosecution); 84 A.L.R. 749 (1933) (quo warranto); 94 A.L.R. 359 (1935) (injunction); 36 A.L.R. 533 (1925) (contempt).

⁹ *State ex rel. McKittrick, Atty. Gen. v. C. S. Dudley Co.*, 340 Mo. 852, 102 S.W. (2d) 895 (1937) (any act in furtherance of advising clients is the practice of law); see 42 *MICH. L. REV.* 1122 (1944); 24 *L.R.A. (n.s.)* 750 (1910).

¹⁰ *Fink v. Peden*, 214 Ind. 584, 17 N.E. (2d) 95 (1938) (doing that which an attorney is authorized to do); *People ex rel. Ill. Bar Assn. v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931) (giving advice or rendering service requiring the use of any degree of legal knowledge or skill is the practice of law); 7 *C.J.S., Atty.-Client*, § 3(g) (carrying on the business of an attorney or practicing that which an attorney or counselor-at-law is authorized to do and practice; exercising the calling or the profession of the law).

¹¹ *Mandelbaum v. Gilbert and Barker Mfg. Co.*, 160 Misc. 656, 290 N.Y.S. 462 (1936); *Lowell Bar Assn. v. Loeb*, 315 Mass. 176, 52 N.E. (2d) 27 (1943) (examination of statutes, judicial decisions and department rulings, and rendering advice thereon); *People ex rel. Chicago Bar Assn. v. Goodman*, 366 Ill. 346, 8 N.E. (2d) 941 (1937) (advising others as to their legal rights, methods to be pursued and the procedure to be followed for enforcement of such rights).

the validity of a tax or the effect of a tax statute with respect to matters outside the accounting field, or determining legal questions preliminary to making out a lawful income tax return.¹² This, in conjunction with the traditional idea that the analysis and interpretation of case law are a lawyer's functions,¹³ would seem to indicate that an accountant such as Bercu who determined tax questions by examination of statutes, cases and regulations was engaged in the traditional practice of law. Obviously, it would be incumbent upon any competent tax expert to do these things. This approach to the problem leads undeniably to a monopoly by lawyers of certain income tax functions, but the bar associations contend that such restrictions are necessary to protect the public from the danger present in relying on untrained persons for legal advice.¹⁴

Some courts have said that laymen do not engage in the unauthorized practice of law by drawing simple instruments.¹⁵ The same result has been reached if the layman does not accept consideration for his work,¹⁶ if the legal practice is ancillary to his primary duties,¹⁷ or if it is the community custom for lay persons to perform certain legal functions.¹⁸ At best, these decisions furnish only vague analogies to guide attempts at drawing the line between the practice of law and the practice

¹² Report of the American Bar Assn. Committee on Unauthorized Practice, 63 A.B.A. REP. 322 at 325 and 326 (1938).

¹³ *Rosenthal v. Shepard Broadcasting Co.*, 299 Mass. 286, 12 N.E. (2d) 819 (1938); *Grievance Committee of the Bar of New Haven Co. v. Payne*, 128 Conn. 325, 22 A. (2d) 623 (1941). Cf. *Elfenbein v. Luckenbach Terminals, Inc.*, 111 N.J.L. 67, 166 A. 91 (1933), where the court found that an accountant's offer of services which would reduce taxes was not illegal practice of law.

¹⁴ *Mandelbaum v. Gilbert & Barker Mfg. Co.*, 160 Misc. 656, 290 N.Y.S. 462 (1936); 63 A.B.A. REP. 322 (1938). See 17 NEB. L. BUL. (Proceedings of the Neb. State Bar Assn.) 54 (1938), where the author points out that anyone can call himself an accountant, and that the title of certified public accountant can be secured in some places without formal education.

¹⁵ *In re Opinion of Justices*, 289 Mass. 607, 194 N.E. 313 (1935) (free services to the poor and title searches also held not to be the practice of law); *Lowell Bar Assn. v. Loeb*, 315 Mass. 176, 52 N.E. (2d) 27 (1943) (drawing income tax forms of the simplest kind not the practice of law). *Bump v. Dist. Ct. of Polk Co.*, 232 Iowa 623, 5 N.W. (2d) 914 (1942) (court stated that single occurrences of acts known as the practice of law were not the evils sought to be prohibited); *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666 (1919); *State v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941).

¹⁶ *State ex rel. McKittrick, Atty. Gen. v. C. S. Dudley Co.*, 340 Mo. 852, 102 S.W. (2d) 895 (1937); *Cain v. Merchants' National Bank & Trust Co.*, 66 N.D. 746, 268 N.W. 719 (1936).

¹⁷ *Bennet v. Goldsmith*, 280 N.Y. 529, 19 N.E. (2d) 927 (drawing affidavits incidental to practice before the immigration board proper for layman); *Umble's Estate*, 117 Pa. Super. 15, 177 A. 340 (1935); *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934).

¹⁸ *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919) (practice of law defined as that commonly done by attorneys); *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940) (drafting of instruments by real estate brokers in realty transactions said to be in the public interest).

of accounting in the field of income taxation. For the most part, the courts' desire for some definite standard of law has not led to consideration of the broader issues of whether there is need for such a line; whether lawyers should have a monopoly in the tax field; or whether the public is as well or better served in this work by the certified public accountant.

The legal profession has admitted there is an overlapping of functions, and lawyers agree that one of the accountant's primary functions is the preparation of ordinary income tax returns.¹⁹ Furthermore, the application of income tax principles by accountants in setting up account books, or in other instances where such use is incidental to their primary function,²⁰ is recognized by lawyers as permissible. An analogy is found in the architect's use of building codes. The bar has drawn the line, however, at the point where an accountant, as in the *Bercu* case, attempts to give legal advice not clearly associated with filling out a return.

Lawyers themselves have stated that when the protection of the public no longer requires members of the bar to handle certain affairs exclusively, other proficient professions should be admitted to the practice of that function.²¹ The court in the *Bercu* case remarked, however, that proficiency was not the test.²² If such a standard were accepted, many fields might be preempted by persons trained only in those specific problems or by persons who merely hold themselves out to be expert in such matters. Such possibilities hold no benefit for the public if broad legal training is necessary to the sound analysis of legal problems and to the proper protection of clients.

Lawyers are at a disadvantage in seeking income tax business, since certified public accountants are not restricted by the canons of the American Bar Association which forbid solicitation of business by its mem-

¹⁹ *Merrick v. American Security & Trust Co.*, (App. D.C., 1939) 107 F. (2d) 271; *Lowell Bar Assn. v. Loeb*, 315 Mass. 176, 52 N.E. (2d) 27 (1943); Report of the American Bar Assn. Committee on Unauthorized Practice, 69 A.B.A. REP. 263 at 266 (1944). Cf. *Hermox v. Comm.*, 11 T.C. 442 (1948), which refused to allow a taxpayer the right to assert, as a defense to a tax penalty, his reliance upon the advice given by an accountant.

²⁰ See *State Board of Accountancy v. Sykes*, unreported, but discussed in 86 J. OF ACCOUNTANCY 7 (1948), which defined the scope of accounting as the preparation, analysis and rendition of profit and loss statements and balance sheets, and the verification and audit of accounts. Note that only accountants were involved in this case. See also *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. (2d) 209 at 216 (1948).

²¹ *NEW YORK COUNTY LAWYERS' ASSN. YEAR BOOK* 261 at 265 (1933): ". . . whenever lay agencies can perform functions for the benefit of the community more effectively and more efficiently than the Bar performs them, the Bar will have to permit these functions to be performed by lay agencies. It is only in the field where there is injury to the public, that the Bar may, because of its knowledge and experience, press for restraint of lay activities."

²² *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. (2d) 209 at 219 (1948).

bers.²³ This is the root of much of the friction between the professions; it is ignored by the recommendation that any line which is to be drawn between the functions of the two groups should be made by the taxpayer in the marketplace, not by the courts.²⁴ Although this argument appeals to a sense of free competition, it fails to consider the unfairness which would be involved in such open competition, because the certified public accountant is apparently permitted to solicit business freely, so long as he does not secure it from other members of his profession.²⁵ Perhaps a satisfactory solution could be reached if accountants were forbidden to solicit income tax business, or if the legal canons were relaxed to allow lawyers to seek out such business. Neither suggestion is likely to be acceptable to both professions, however. The first would deprive accountants of a valuable privilege, and the second might set a dangerous precedent for further relaxing the canons of legal ethics if other specialized fields were divorced from the traditional practice of law.

B. *The Accountants' Position*

Accountants have often claimed a prior right in the income tax field, insisting that they should not be cast out of the practice by lawyers who are generally incapable of handling the work efficiently.²⁶ Reliance is placed on certified public accountants' thorough training in accounting methods, which lawyers do not have. Further, it is pointed out that the examinations passed by all certified public accountants include questions on income tax matters, while few bar examinations touch on the subject. As do the lawyers, accountants generally admit there are dual functions in the field,²⁷ and that some phases of income tax work are purely legal. However, they assert that these purely legal problems are only collateral matters which arise in income tax questions.²⁸

²³ A.B.A. CANONS OF LEGAL ETHICS 27 (1936) ("... solicitation of business by . . . advertisements . . . is unprofessional."); *id.* at 28 (lawyers cannot engage in champertous conduct); *id.* at 46 (lawyers cannot advertise a specialty except by way of a brief notice in professional lists addressed to other attorneys).

²⁴ 56 YALE L.J. 1438 (1947).

²⁵ The seventh rule of professional conduct of the American Institute of Accountants states, "A member or an associate shall not directly or indirectly solicit the clients or encroach on the practice of another public accountant. . . ." See Maxwell and Charles, "Joint Statement as to Tax Accountancy and Law Practice," 32 A.B.A. J. 5 (1946).

²⁶ See 52 REP. OF NEW YORK STATE BAR ASSN. 290 at 307 (1929), containing facts which lend support to this assertion.

²⁷ 85 J. OF ACCOUNTANCY 216 (1948).

²⁸ See *ibid.*, admitting that questions of domicile, trust law and will construction are strictly legal questions.

For a number of years, the legal profession has neglected the practice of income tax law while accountants justifiably occupied the field. Only recently has the American Bar Association instituted concentrated programs to bring lawyers up to date in tax matters,²⁹ giving rise to the suggestion that such sudden interest is motivated by a desire to profit from a lucrative practice.³⁰

As did the defendant in the *Bercu* case, accountants generally urge that income taxation is actually not law but accounting. To substantiate this position, they point out that since 1909 accountants have done most of the income tax work; that the staff of the Treasury Department is made up mostly of accountants; that accountants acted as advisers to the Treasury Department in launching its income tax program, and that qualified accountants are permitted to practice before the Treasury Department and the Tax Court.³¹

The court in the *Bercu* case answers the claim that income taxation is nothing more than accounting by pointing out the numerous criticisms leveled at the Internal Revenue Code by accountants, and concluding from this that accountants do not in fact feel the code is set up entirely on accounting principles.³² The contention that the determination of income is an accounting function is quite accurate when figuring income for a businessman who wishes to know the status of his business. For income tax purposes, however, this is not always true. It is pointed out in the *Bercu* case that in no field like that of income taxation is a correct solution to a question so dependent on the keen understanding of many other phases of the law.³³

Accountants will no doubt attempt to draw support from *Auerbacher*

²⁹ The bulk of income tax work in the country is not handled by attorneys; 70 A.B.A. REP. 257 at 259 (1945); 29 A.B.A.J. 516 (1943) (describing the inauguration of tax classes for lawyers).

³⁰ For the accountant's view, see 85 J. OF ACCOUNTANCY 182 at 184 (1948). "... [A] mere handful of lawyers, inflamed with zeal for the crusade against the unauthorized practice of law . . ." is blamed for the present conflict. ". . . [T]hey have preached the gospel of discipline and forcible restraint of laymen whom they conceive to be invading their field. They have formulated sweeping statements of policy without specific definition of how such policies will be applied in specific areas. . . . [W]hile they claim that protection of the public interest is their motive, there is evidence that some of them are not animated entirely by altruistic purposes."

³¹ See the Papers on Appeal, affidavit and appendices thereto, of William R. Donaldson, *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1948).

³² *In re Bercu*, 273 App. Div. 524, 78 N.Y.S. (2d) 209 at 217 (1948).

³³ *Id.* at 218; also see, Maxwell and Charles, "Joint Statement as to Tax Accountancy and Law Practice," 32 A.B.A.J. 5 at 7 (1946): "... for tax purposes business income is actually determined in part in accordance with generally accepted accounting principles, and in part in accordance with special rules of law and regulations."

v. Wood,³⁴ a recent case holding that a labor consultant who incidentally decided questions of law was not engaged in the practice of law. Even in this field the courts note carefully that the independent practice of law where fees are charged is illegal. When a labor consultant uses the law as a tool in the exercise of his primary function, however, he is not practicing law. This the courts recognize as necessary so that persons well equipped to advise in the intricacies of labor-management relations will be free to do so. The *Auerbacher* case adds nothing to the rights of non-practitioners in the field of income taxation, since the courts all grant to accountants the right to fill out ordinary tax returns, and to advise on questions of law that arise in conjunction with that primary function.

The *Dobson* case³⁵ has been relied on by accountants to found their contention that income tax work presents for the most part mere issues of fact, rather than legal questions which only the lawyer can answer. This argument seems to ignore the real reason for the decision in that case, however. There the Supreme Court merely wished to recognize the special competency of the Tax Court (made up wholly of lawyers) to decide income tax matters, and to cut down the growing flood of cases appealed therefrom.³⁶ Labelling income tax questions as issues of fact was a device to impart a certain degree of finality to Tax Court decisions. Furthermore, if the Tax Court had decided the *Dobson* case differently and imposed a tax, conceivably the Supreme Court would have been presented with a clear question of law as to the constitutionality of the imposition under the Sixteenth Amendment.³⁷ Thus such reliance as the accountants place upon this decision does not seem justified.

The American Bar Association has recommended that both an attorney and an accountant be engaged to solve income tax problems.³⁸ This suggestion is attacked by accountants as requiring the taxpayer to bear a double expense. But if the accountant is permitted to fill out ordinary income tax returns and to decide incidental legal questions, necessary additional help will cause added expense to the taxpayer whether it comes from a lawyer or a certified public accountant.

³⁴ 48 P-H Am. Lab. Cas. 1278 (1948), digested in 86 J. OF ACCOUNTANCY 930 (1948).

³⁵ *Dobson v. Comm.*, 320 U.S. 489, 64 S.Ct. 239 (1943).

³⁶ *Id.* at 498-499.

³⁷ The *Dobson* case has probably been overruled by statute; 26 U.S.C.A. § 1141 (1947), allowing review of Tax Court decisions in "the same manner and to the same extent as decisions of the district courts."

³⁸ 63 A.B.A. REP. 322, 325 (1938).

C. *Conclusions*

Irrational wrangling between the professions has been rampant since the temporary failure of the Joint Conference of Lawyers and Certified Public Accountants,³⁹ which was set up in 1944 to remedy their basic differences. Such dispute serves only to destroy public confidence and to hinder the progress of business, which is ultimately dependent on the cooperation of the two groups.

The interests of the public, the government, lawyers and accountants must be considered by any proposed solutions. The first two are paramount. The public will be served only if both professions are willing to negotiate their differences in the spirit in which the first joint conference was conceived and originally carried out. Other solutions, such as permitting the taxpayer to buy his services where he wishes, or restricting income tax practice to certified public accountants, lawyers and Treasury personnel,⁴⁰ are objectionable to the legal profession because of the element of unfair competition discussed previously.

The government's interest certainly is that the income tax law be efficiently and accurately administered. Should accountants be allowed to practice tax law, it is conceivable that through organized solicitation they could preempt the field. Then, if the bar did not relax the canons applicable to lawyers, the legal profession would be apt to neglect keeping abreast of the newest tax developments.

Since relaxation of the canons is unlikely, and since accountants are unlikely to relinquish their right to solicit tax business, members of the professions, both of which recognize that certified public accountants may not practice law, should meet in periodic deliberations to draw the elusive line between the practice of law and the practice of accounting in the field of income taxation. Litigation and thoughtless criticisms will serve only to widen the gulf between the two professions.⁴¹

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³⁹ Resolution of the National Conference of Lawyers and Certified Public Accountants, May 6, 1944; *id.*, May 10, 1944. Principles were set up to govern the actions of both professions, but the cooperation expected was destroyed by campaigns similar to that of the Bercu case.

⁴⁰ H.R. 5732, 80th Cong., 2d sess. (1948), sponsored by Representative McMahan, a certified public accountant from New York, proposes such a restriction.

⁴¹ See "Crisis in Lawyer-Accountant Activities," 85 *J. OF ACCOUNTANCY* 182 (1948); and Goldberg, "A Plague on Both Their Houses: The Accountant-Lawyer Differences Over Tax Practice," 84 *J. OF ACCOUNTANCY* 188 (1947).