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FEDERAL TAXATION

PERSPECTIVE DURING THE FIFTH DECADE

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SINCE the enactment of the income tax provisions of the Tariff Act of October 3, 1913[1] forty years have elapsed within which we have seen a profound change in the revenue system of our federal government, the growth of a great new branch of public law, the development of a highly specialized field of legal practice and the publication in legal periodicals of innumerable articles on the subject of taxation. Tax men can, with great pride, point out that technical proficiency has done an amazing job of keeping pace with the rapid expansion of the system from the utilization of the latest punch card accounting machines by the Internal Revenue Service to an orderly procedure for the hearing of thousands of taxpayers' protests before a tribunal which did not exist prior to 1924,[2] to the creation of professional journals dealing exclusively with taxation. There is no reason to believe that technological progress will falter in the next decade regardless of the course federal taxation may take. The course it will take is the real matter of concern and is in large measure controlled by the perspective of those individuals who formulate tax policies, the members of the congressional committees, the judges, the policy makers within the Treasury Department, and the experts who influence those officials, the accountants, the economists, and the members of the tax bar. It is with the subject of perspective that this article is concerned, and the thesis of the following comments is that the perspective must be sweeping; that those individuals concerned with tax policy should consciously acknowledge that taxation is an integral part of the legal and economic fabric of the country and that changes in tax policy must be correlated with changes in basic economic and legal philosophy.

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1 38 Stat. L. 166 (1913).

2 The Board of Tax Appeals was established by §900, Revenue Act of 1924, 43 Stat. L. 336 (1924).

Absent a significant shift in monetary and fiscal policies to deficit financing of governmental operations, the world outlook for the next decade is such that high budgets can be covered only by high revenue yields.[3] Since it is axiomatic that sustained high taxes magnify the weaknesses in any revenue system and intensify the search for loopholes the strain on the federal tax structure will doubtless increase as the next decade wears on. Where will the strain be felt, what will be done to relieve it? It will be felt at the points at which taxpayers feel that pressure may bring relief, in Congress at the point of enactment, in the Internal Revenue Service at the point of administration and in the courts at the point of interpretation. The responses of Congress, the Internal Revenue Service and the courts will reflect the approach of the individuals in those branches of the government who formulate tax policies by legislation, regulation or decision. If the perspective of those individuals is narrow, if they look only to a solution of the particular problem before them at the moment and fail to coordinate their responses in such a way as to formulate broad integrated policies, a collapse of the federal tax system or the destruction of some sectors of our economy may be anticipated within the decade. For that reason it behooves those tax experts who appear before the Congress, the courts and the Internal Revenue Service to eschew the partisan approach and acknowledge their duty to aid the legislators, administrators and judges in formulating sound tax policies.

Taxation is so much a part of monetary and fiscal policy, so involved in general economic theory and so related to law that it cannot be divorced from economics or law.[4] Yet people often toy with the idea of divorce, or at least separation, when dealing with certain aspects of taxation. Whether it is done through ignorance or maliciousness is often hard to determine, but regardless of how done, it creates damage and increases the strain on the tax structure. If the economic and legal climate is changing in one direction and the tax structure is modified in the opposite direction the structure may collapse.[5] While there is little hope of changing the approach of the individual who maliciously advocates modification running counter to the economic and legal climate, those who act through ignorance can be educated,

[3] In the budget message delivered to Congress on January 21, 1954, President Eisenhower estimated total expenditures for the 1955 fiscal year of $65.6 billion, total receipts of $62.7 billion and renewed his request to Congress to raise the debt limit which is fixed at $275 billion. 100 CONG. REC. 545 (Jan. 21, 1954) (H. Doc. 264). Since mid-1953 the outstanding debt has averaged in excess of $272.5 billion.

[4] ANDERSON, TAXATION AND THE AMERICAN ECONOMY xix (1951).

[5] Sedillot, "Why Frenchmen Don't Pay Taxes," N.Y. TIMES, Sept. 6, 1953, §VI, p. 14.

even self-educated. Unfortunately there is a lack of written material dealing expressly with the relationship of taxation to other fields of economics and law, few formal courses relating to the matter of the relationship are offered in law schools or graduate schools and often times professional jealousies make communication between accountants, economists and lawyers almost impossible. Unquestionably a conscious attempt is being made to fill the gaps which exist in the writings[6] and in the course offerings;[7] and communication must be expanded, not at the price of pride, but at the price of conceit. Each profession can learn much from the others that will make for a better tax structure. In an attempt to accelerate movement toward that goal a conscious practice should be made of expressly reconciling proposed changes in the tax policy with what is honestly believed to be a true picture of the present economic and legal structure of the country. If it is felt by some that they are not familiar enough with the economic and legal structure of the country to be able to anticipate the manifold consequences of their proposed change in tax policy on the entire structure they would do well to reflect on whether they are acting in an irresponsible manner by advocating the change. If they feel they can predict the economic and legal consequences of their proposal because their predictions rest on reason, let them reflect on whether their reasoning, if it is through use of the syllogism, may perhaps rest on an implied major premise which proves to be false when subjected to careful scrutiny. In short, we must stop irresponsible statements which may influence those congressmen, judges and tax administrators who effect the alterations in our tax structure. They face perhaps the most difficult decade in the history of the federal income tax and they must have all the aid the professional accountants, economists and lawyers can give them in formulating sound tax policies.

Sound tax policies are effected by the creation of a tax structure which mirrors the canons of taxation, which in reality are but shorthand statements reflecting the effectiveness with which a tax has been integrated into the then existing economic and legal fabric of the country. One of the earliest, and certainly the best known, state-

[6] For examples, see BLOUGH, THE FEDERAL TAXING PROCESS (1952), POOLE, FISCAL POLICIES AND THE AMERICAN ECONOMY (1951), ANDERSON, TAXATION AND THE AMERICAN ECONOMY (1951), THE NATIONAL TAX JOURNAL.

[7] For examples, see COLUMBIA UNIVERSITY SCHOOL OF LAW BULLETIN, 53d series, No. 37, p. 34; 50 HARVARD UNIVERSITY LAW SCHOOL BULLETIN, No. 7, p. 57; 53 UNIVERSITY OF MICHIGAN LAW SCHOOL ANNOUNCEMENT, No. 73, p. 29; 1954 SOUTHERN METHODIST UNIVERSITY CATALOGUE, Pt. VI, School of Law Bulletin, p. 46.

ments of the canons of taxation appeared in Adam Smith's *Wealth of Nations* in 1776. He said:

> "I. The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. . . .
>
> "II. The tax which each individual is bound to pay, ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. . . .
>
> "III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it. . . .
>
> "IV. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state. . . ."[8]

Since the time of Adam Smith many economists have set down their conceptions of the canons of taxation and a recent study of those economists has classified their statements according to certain broad categories,[9] indicating that there are social, economic and ethical canons, fiscal canons and administrative canons.[10] The study went on to demonstrate that as the conception of the capitalistic economy has evolved from the time of Adam Smith to date there has been a corresponding evolution in the terms in which the canons are stated, e.g., references by Smith to the canon of equality presumed sacrifice proportional to the income of the taxpayer while today equality incorporates the conception of sacrifice based on progression.[11] It is thus apparent that if one is familiar with the evolution of the canons of taxation over the past 177 years he may have acquired knowledge which will enable him to predict the degree and direction of their evolution in the decade ahead. To the extent the canons reflect economic evolution, the observation of professional economists should be given careful consideration; to the extent they reflect legal evolution, the observation of lawyers should be useful in evaluating proposed changes in the tax structure. If action which is in accord

[8] Book V, c. II, part II, Modern Library Ed., 777-778 (1937).
[9] Gulick, "Basic Goals of Federal Taxation," INCOME TAX ADMINISTRATION 3 (1949).
[10] Id. at 4.
[11] Id. at 6.

with the basic economic and legal theory reflected in the canons is then taken in respect of a specific tax proposal a collapse of the tax system or damage to any important sector of the economy need not be feared. However, a brief review of two areas in which the professional tax experts have sought to influence those individuals who formulate tax policy will illustrate a narrowness of perspective and a failure expressly to relate tax policy to basic economic and legal theory which does not augur well for the decade ahead. The first is the congressional arena in which the Internal Revenue Code has been undergoing an examination and overhaul, the second is the arena in which the opinions of the Supreme Court in certain tax cases have been subject to searching criticism, i.e., the law reviews.

Beginning with the Revenue Act of 1948[12] we have seen numerous technical changes in the Internal Revenue Code[13] made for the purpose of correcting what were apparently felt to be inherent inequalities of treatment among taxpayers. The extended hearings of the House Ways and Means Committee during the summer of 1953[14] also reflected the felt need for a more or less complete overhaul of the code to get rid of inequalities, as have the reports emanating from the committee as it works on the current act.[15] All of those actions reflect the fact that as the years of high tax rates continue the protests of the public mount, and they raise the serious question of whether inequalities are really being removed or actually compounded, for as one taxpayer benefits from a special technical amendment all other taxpayers suffer a detriment in respect of their relationship to the benefitted taxpayer. To use the language of the noted economist Roy Blough, "So-called 'technical' amendments commonly present the problem of whether they promote uniformity by removing special hardships or create discrimination by granting special privileges."[16] In commenting on the Revenue Act of 1948 increase in the exemption to blind people, Professor Surrey said:

> "And again, it should be apparent that the income tax is not the vehicle for relief to special groups handicapped by physical ailments. . . . To prevent such distortions of the exemption

[12] Stat. L. 110 (passed April 2, 1948, over presidential veto).

[13] For examples, see Technical Changes Act, 63 Stat. L. 891 (1949); Revenue Act of 1951, 65 Stat. L. 452 (1951); Technical Changes Act of 1953, 67 Stat. L. 615 (1953).

[14] Hearings before Committee on Ways and Means on General Revenue Revision, 83d Cong., 1st sess. (1954).

[15] See statements of Chairman Reed of House Ways and Means Committee, N.Y. TIMES, Jan. 5, 1954, p. 15:4.

[16] BLOUGH, THE FEDERAL TAXING PROCESS 22 (1952).

> provisions of the income tax, both the old-age and blindness exemptions should be eliminated. But such exemptions, once granted, are difficult to remove and, more likely breed additional aberrations."[17]

The aberrations are on the increase and if the demands for revenue continue high one cannot predict where they will end. In addition to what might be called the group aberrations there have crept into the code a number of amendments which, if enacted in the field of municipal corporation law would be called "special" legislation. It is sufficient to enumerate only a few examples to indicate precisely what is meant. While it is generally acknowledged that many years ago section 120 of the code relating to unlimited charitable contributions was enacted for the purpose of making certain charitable deductions available to an extremely limited class of taxpayers[18] the number of special exceptions have increased rapidly in recent years; for example, the provisions of section 23(o)(6) made provision for a special charitable deduction for certain contributions to the United Nations[19] [see also section 23 (q)]. It is understood that section 117(p) dealing with taxability to employee of termination payments was also enacted to cover a special situation.[20] Turning for the moment to the Federal Estate Tax the enactment of section 863(c) was for the purpose of accommodating another special situation.[21] Many similar provisions can readily be called to mind by people intimately familiar with the code and the recent amendments to it, particularly in the relief provisions of the Excess Profits Tax Act of 1950.[22]

This is not to decry what has been done but to raise questions. Is Congress cognizant of what it has done by enacting provisions of that kind? How many more such amendments can the code stand before it becomes a completely unintelligible maze, even to the tax expert? If such action continues throughout the next decade will the federal tax structure more nearly conform to the canons of taxation or have departed further from them? The answers are fairly obvious and demonstrate the need for a reorientation to the canons of taxation by the congressional committees and a change in the methods used in presenting proposals to the committees. There is

[17] Surrey, "Federal Taxation of the Family—The Revenue Act of 1948," 61 HARV. L. REV. 1097 at 1103 (1948).

[18] Revenue Act of 1924, §214(a)(10), 43 Stat. L. 271.

[19] 61 Stat. L. 6 (1947).

[20] Revenue Act of 1951, §329, 65 Stat. L. 504 (1951).

[21] 64 Stat. L. 576 (1950).

[22] 64 Stat. L. 1137 (1951).

little evidence to show how consciously the congressional committees reconcile the proposals submitted to them with their conception of the canons of taxation, so all that can be done is to urge upon them the advisability of such conduct. There is, however, considerable evidence relating to the methods used in presenting proposals to the committees, in the form of the published hearings. The reports of the hearings unfortunately reflect a uniformly partisan approach as the reader might well expect.[23] If partisan approach was always balanced by partisan approach it might be expected that the committee members would be able to formulate rules that would be just to all, but too often proposals are not balanced by counter proposals; and too often the presentation is so confused or slanted that the committees cannot accurately assess the impact on the tax structure that would result from adoption of a specific proposal.[24] While it is acknowledged that anyone appearing before a committee has a right to be an advocate he should remember that he owes a higher duty to his country than to an individual client,[25] and when called on to aid a congressional committee in formulating their judgment he should make explicit the economic, political and social implications implicit in the proposals which he makes. If the individual is advocating a special exception for a particular taxpayer it would seem that he owes the duty to make the point clear; if he is advocating a proposal which involves an inherent change in or which is not consistent with existing monetary and fiscal policy he should acknowledge the fact and offer sound reasons for advocating such change. In short, he should be willing to lay a firm background for the proposal rather than attempt to hide what he considers to be points about which objections might be raised.

An example of an area in which the congressional committees should have the clearest possible view of the relationships of the proposal to basic economic, political and social premises is found in the current controversy over the proposed 25 percent constitutional limitation on the income tax,[26] which in turn reflects on the basic concept of progressive taxation. Yet the views expressed generally fail to discuss the basic consequences which would flow from adoption of the proposal. Since non-adoption would not affect the status

[23] BLOUGH, THE FEDERAL TAXING PROCESS 32 (1952).

[24] Ibid.

[25] Swaine, "Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar," 35 A.B.A.J. 89, 171 (1949).

[26] Popularly known as the Reed-Dirksen Amendments, H.J. Res. 323, 82d Cong., 1st sess. (1951), H.J. Res. 103, 83d Cong., 1st sess. (1953).

quo the opponents may perhaps be excused for not probing deeply into the consequences,[27] but that does not excuse the proponents from discharging their duty. In a recent review of the volume *The Uneasy Case for Progressive Taxation* by Blum and Kalven,[28] Albert L. Hopkins said:

> "Progressive income tax violates the fundamental American principle that a hard-working, thrifty person is entitled to the fruits of his labor. The real difference in incomes, in the main, results from intelligence, hard work and the willingness to forego immediate spending and save for the future. Such savings are invested in productive property, which is not only of benefit to the state but is of benefit to the person who saved and invested. The amount of income on inherited wealth is relatively unimportant when compared with the total income of the country. As soon as we depart from these fundamental principles, we approach socialism, which is practically the same as communism, as practiced in those countries where there is a free right to vote. No socialist government has ever survived, and the communist government will survive only so long as it can maintain its tyranny and dictatorship through military power."[29]

In the same journal Robert B. Dresser published an article entitled "The Reed-Dirksen Amendment: A Reply to Professor Cary"[30] in which he made reference to an article by William R. Biggs, Vice-President of the Bank of New York, and extracted the following comments by Mr. Biggs:

> "The second and most outstanding conclusion to be drawn from this study is the vulnerability of the receipts side of the federal budget to a business decline. In the last twelve years the United States has built up a revenue system which depends to the extent of nearly 80% of total receipts on corporate and individual income taxes. No government in the world, to our knowledge, raises such a large proportion of its budget from income taxes (personal and corporate) as the United States. In most countries, including members of the British Commonwealth, the percentage of the budget raised from income taxes (personal and corporate) is nearer 50% than the 80% in the United

[27] For comment in opposition, see Griswold, "Can We Limit Taxes to 25 Per Cent?" 190 ATLANTIC MONTHLY, p. 76 (Aug. 1952); Cary, "The Income Tax Amendment: A Strait Jacket for Sound Fiscal Policy," 39 A.B.A.J. 885 (1953).

[28] Chicago: Univ. of Chicago Press (1953).

[29] 40 A.B.A.J. 51 (1954).

[30] Id. at 35.

States. Because of this dependence on income taxes, revenues are especially difficult to predict. . . .

"A decline in business and in profits finds the government a deeply involved partner, so that its tax receipts fade very rapidly. . . .

"These estimated budget deficits are disturbing as an indication of what may be in store for the United States economy in the event of a decline in business. . . .

"If the long-term integrity of the dollar is to be maintained, the present top-heavy dependence for revenue on income taxes must be adjusted. Reform of the revenue system will not be easy politically, since it will involve finding new sources of income such as a national sales tax of some kind."[31]

The foregoing are fairly illustrative of the position taken by the advocates of the proposed amendment and may be summarized approximately as follows: extremely high progression is bad because it stifles initiative and interferes with savings (the consequences of which may ultimately destroy our capitalistic society), the revenue system is top-heavy income tax wise and therefore vulnerable to recession, the solution lies in the adoption of some kind of a national sales tax.

If the concept of burden of proof is invoked for the moment it would seem that the proponents must be able to reconcile their proposal with the existing basic economic, social and political premises.

The conclusions drawn by most of the well recognized economists as to forces controlling the economic well being of this country reflect Keynesian, or at least quasi-Keynesian economic philosophy. Keynes drew certain conclusions in respect of savings which have been nicely described in lay language by the economist Heilbroner as follows:

"There is one portion of our incomes which does not go directly out onto the market place to become another's income: that is the money we save.

"If we tucked our savings into mattresses or hoarded them in cash, we should obviously disturb the evenness of the circular flow of income. . . . If such a freezing process were widespread and continued, there would soon be a cumulative fall in everybody's money income, as less and less was handed around at each turn. We should be suffering from a depression.

"But this dangerous break in the income flow does not in fact take place. For in a civilized community we do not freeze our

[31] Id. at 37.

> savings. We put them into stocks or bonds or banks and in this way make it possible for them to be used again. . . .
>
> "But—and notice this vital fact—there is nothing automatic about this savings-investment channel. Business does not ordinarily need savings to carry on its operations; it works within its regular budget and pays its expenses from the proceeds of its sales. Business only needs savings if it is expanding its operation —for its regular receipts will not usually provide it with enough capital to build a new factory or to add substantially to its equipment.
>
> "And here is where the trouble enters. A thrifty community will always attempt to save some part of its income. But business is not always in a position to expand its operations. . . .
>
> "And therein lies the possibility of depression. *For if our savings do not become invested by expanding business firms, our incomes must decline.* We should be in the same spiral of contraction as if we had frozen our savings by hoarding them."[32]

However, it must be remembered that in formulating his *General Theory of Employment Interest and Money*[33] Keynes did not theorize about savings separate and apart from other concepts. The Keynesian system is couched in terms of aggregate concepts and incorporates five equations and five variables, of which savings-investment is only a single factor which must be integrated into the system at a particular point in time along with the others.[34] As other factors in the equation change, the savings-investment factor must change, be encouraged or discouraged or held static. Consequently, it would seem that the proponents of such a profound change in the tax structure should present detailed evidence of the effect of the change on such factors as consumption, employment and interest rates to the congressional committees for their consideration. If a condition of full employment is the sought goal[35] and if increased consumption will produce full employment and if a sales tax is a deterrent to consumption,[36] Congress obviously would not want to adopt a national sales tax to make up for revenue lost by the placing of a ceiling on income taxes. If respectable economists believe that one of the fiscal advantages of the income tax is its cyclical nature, i.e., that the re-

[32] HEILBRONER, THE WORLDLY PHILOSOPHERS 255 (1953).

[33] New York: Harcourt, Brace & Co. (1936).

[34] Cf. KLEIN, THE KEYNESIAN REVOLUTION 56 (1947).

[35] Id. at 168. Cf. Employment Act of 1946, 60 Stat. L. 23 (1946); presidential concern over unemployment, N.Y. TIMES, Feb. 18, 1954, p. 1:8.

[36] On the issue of whether sales tax is aways a deterrent, see Due, "Sales Tax and the Level of Employment," 2 NAT. TAX J. 122 (1949).

duction of revenue in time of deflation and increase in revenue in time of inflation is a useful tool in controlling inflation and deflation,[37] should not the proponent of the change make those views known to Congress too? Unfortunately the Congress does not appear to be receiving the detailed guidance it should on this matter even from the Council of Economic Advisers if a recent interview of the Chairman, Dr. Arthur F. Burns, by the *New York Times* reflects the information being submitted to Congress. The report of the interview reads in part as follows:

> "In an essay written in 1948, (Dr. Burns) made this observation about Government policy in the depression of the Nineteen Thirties: 'On the whole, consumer spending responded much better to the Governmental measures than private investment.'
>
> "How, then, could he justify an Administration tax policy now that puts emphasis on incentives to private investment rather than on consumer spending? . . .
>
> "The circumstances were quite different then, he explained. The present tax program would have made no sense whatever in the early days of that depression. Business confidence was shattered. Now it is different. Stock prices are up, commodity prices are not down. Investment expenditures are being pretty well maintained. Business confidence is running high. There is a good chance of stimulating investment further.
>
> "As the question is being stated—'do you want to stimulate consumption or production?'—Dr. Burns continued, the 'underconsumptionists' would win.
>
> "But, he said, that does not state the issue correctly. As the facts are now, he said, if you cut a consumer's tax $1, he may spend from zero to $1, no more. If you cut business taxes $1, business may spend as much as $50. A new environment for business spending is created.
>
> "If business confidence is high, why is there a need to stimulate it?
>
> "There has been a decline, he said, adding that no responsible thinker can say positively it will be self-limiting. It could become a spiraling contraction."[38]

The proponents of the constitutional amendment have not explained how the tremendous expansion of the economy since World War II was effected if savings have been in short supply; nor have

[37] ANDERSON, TAXATION AND THE AMERICAN ECONOMY 188 (1951).

[38] Loftus, "Burns Confident of Business Vigor," N.Y. TIMES, Feb. 22, 1954, §1, p. 11:1.

they indicated whether the proposed change would produce an increase in the rate of creation and expansion of corporate enterprises without collateral modification of a tax structure which imposes only a single tax on income that flows through a corporation to a bondholder as interest but a double tax on that which is a dividend. Will the desired economic political and social consequences result if that which became available for savings through reduced taxes flows into insurance and the insurance companies invest it as debt capital rather than equity capital? The proponents of the plan obviously have answers to such basic questions, yet their writings at best carry only implications. The problems that confront Congress in the decade ahead are of such magnitude that it needs to view them in the broadest perspective, but perspective can hardly be based on implications. What is needed are fewer implications and more expressed conclusions which can be examined critically by the Congress and the public as a whole.

Thus far these observations have been focused on the relationship between the Congress and those who appear before it advocating changes in the code. Now consider for a moment the relationship existing between the courts and those lawyers appearing before them in tax cases. The status of that relationship is fairly well revealed in critiques of the tax decisions.

A review of comments made on the decisions of the Supreme Court in federal tax cases since 1940 reflects an interesting shift in the opinion of the writers. Many were critical of the scope of such landmark decisions as *Hallock,*[39] *Clifford,*[40] *Adams,* and *Bazley,*[41] *Tower* and *Lusthaus*[42] and *Court Holding Company.*[43] The comments carried either express or implied criticism to the effect that the rationale of the decisions was so vague that one could never be sure in advising a client whether a fact situation under consideration fell within or without the purview of the cases.[44] After some time had elapsed and much confusion had been created in the lower courts, the issuance of Treasury Decisions amending the Regulations applicable to the code provisions under which those cases arose, e.g., TD

[39] Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940).

[40] Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554 (1940).

[41] Bazley v. Commissioner, 331 U.S. 737, 67 S.Ct. 1489 (1947).

[42] Commissioner v. Tower, 327 U.S. 280, 66 S.Ct. 532 (1946); Lusthaus v. Commissioner, 327 U.S. 293, 66 S.Ct. 539 (1946).

[43] Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707 (1945).

[44] For examples, see Magill, "What Shall be Done With the Clifford Case?" 45 COL. L. REV. 111 (1945); Magill, "Sales of Corporate Stock or Assets," 47 COL. L. REV. 707 (1947).

5488[45] promulgating the *Clifford* regulations, were greeted with acclaim as clear expression of standards on which one could rely in tax planning.[46] More recently the Supreme Court decided the *Culbertson* case,[47] and in that opinion it criticized certain interpretations which had been placed on its opinions in *Tower* and *Lusthaus*. It did the same in the *Cumberland Public Service Company* case[48] which modified *Court Holding Company*. The opinions in those two cases reflect an attempt by the Court to define more sharply the concepts formulated in *Tower* and *Lusthaus* and *Court Holding Company* and when coupled with more recent decisions reflects a reluctance to deal with the issues before it as broadly as it did in the early 1940s. The response of the tax bar to this apparent shift to a more narrow technique of statutory interpretation is reflected in the favorable comments on the recent decisions as relatively precise statements on which a practitioner engaged in tax planning can rely with considerable assurance.[49]

At this point it may be worth while to speculate on the consequences which may flow from a shift in the technique of statutory interpretation such as that just sketched, to determine whether the attitude of the commentators remains static or is responsive to the shifts in technique. It becomes apparent on reflection that while precise statements of the scope of a statute makes for ease in compliance, such precise statements simultaneously mark the boundaries for circumvention. It might be well for those who applaud decisions such as *Cumberland Public Service Company* as the answer to confusion created by *Court Holding Company* to review that line of cases dealing with the "transfer intended to take effect in possession or enjoyment at or after his death" clause of section 811(c) of the code,[50] from *May v. Heiner*[51] to *Klein v. United States*[52] to the *St. Louis Trust Company* cases[53] to *Hallock*.[54] It will be recalled that in the *St.*

[45] 1946-1 Cum. Bul. 19.

[46] For example, see Guterman, "The New Clifford Regulations," 1 TAX L. REV. 379 (1946).

[47] Commissioner v. Culbertson, 337 U.S. 733, 69 S.Ct. 1210 (1949).

[48] United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280 (1950).

[49] For examples, see Gutkin and Beck, "Culbertson Case May Herald New Era in Family Partnerships," 88 J. ACCT. 121 (1949); Gutkin and Beck, "Sale of Assets Received on Liquidation," 28 TAXES 328 (1950).

[50] Reference is to the form of §811(c) prior to amendment by Technical Changes Act of 1949, 63 Stat. 891 (1949).

[51] 281 U.S. 238, 50 S.Ct. 286 (1930).

[52] 283 U.S. 231, 51 S.Ct. 398 (1931).

[53] Helvering v. St. Louis Trust Co., 296 U.S. 39, 56 S.Ct. 74 (1935); Becker v. St. Louis Trust Co., 296 U.S. 48, 56 S.Ct. 78 (1935).

[54] Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940).

Louis Trust Company cases a change in the form of the words of creation of the interests was found to be sufficient to avoid the application of the rule of the *Klein* case. Then came the *Hallock* decision which overruled the *St. Louis Trust Company* cases, and in so doing produced Justice Frankfurter's famous statement: "Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law."[55]

While one may argue that it is beyond the province of the Court to concern itself with the rational foundations of the tax law since the foundations of that law are supposed to be the concrete statements of the Congress resting on the granite of the Constitution, such an argument immediately encounters difficulties. Unless the Congress is willing to draft very detailed statutes it must perforce delegate to the courts the task of legislating in the intersticial areas by statutory interpretation. If the Congress is most detailed in its drafting the very precision which is sought marks the boundaries for circumvention just as in the case of the court decisions, and once again the courts must become concerned with maintaining the rational foundations of the law unless the public is willing to allow the loophole to remain until Congress closes it. An excellent example of that type problem is found in the history of the *Clifford*[56] type short term irrevocable trust. Following considerable controversy regarding the taxability of the grantor on the income earned by short term trusts, Congress enacted as a part of the Revenue Act of 1934 the section which became section 166 of the code.[57] That section made the income from revocable trusts taxable to the grantor, but made no reference to irrevocable trusts. In 1934 the taxpayer, Clifford, created a five year irrevocable trust of which his wife was the beneficiary. The Commissioner contended that the income of the trust was taxable to Clifford and when the case reached the Supreme Court it upheld the Commissioner, imposing the tax under the sweeping language of section 22(a), declining to heed the dissenting argument of Justice Roberts to the effect that past administrative interpretation and the carefully drawn section 166 evidenced a congressional intent not to tax income from irrevocable trusts to grantors.[58] Though it took nearly six years to promulgate the clarifying *Clifford* regulations Congress

[55] Id. at 117.
[56] Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554 (1940).
[57] Revenue Act of 1934, §166, 48 Stat. L. 729 (1934).
[58] 309 U.S. 331 at 339.

never reversed the Supreme Court by enacting legislation contra to the decision, so it may be presumed that that Court's interpretation was in accord with the rational foundation of the tax laws.

The tax practitioner who views a particular decision as too narrow or too broad should perhaps reflect on the vantage point from which he views the decision before he criticizes it publicly. If he is concerned with a tax problem to which the decision is pertinent his viewpoint may well vary depending on whether he is representing a client who is planning a particular transaction, or one who has completed a transaction and is seeking advice as to what tax consequences have been generated. More often than not the man who is in the planning stage wants a well marked course which he can traverse, knowing that pleasant consequences will be assured and unpleasant consequences avoided, while the man in the post-transaction stage wishes to show that the course was ill marked and that he should be excused for his excursions into pitfalls. As might be expected our attitude toward the manner in which we would like to see a particular court approach the interpretation of a particular statute varies in the same way.

No tax practitioner can honestly say that the courts have no right to legislate. Such a statement would be an indication of a complete lack of understanding on his part of jurisprudence generally and statutory interpretation specifically, for what is interpretation but a form of legislation. Yet no one wants to see the judiciary usurping the prerogative of the legislative branch. Where we place ourselves between the two extremes is in large measure controlled by our perspective. Until we are well satisfied with the range of our perspective, having weighed our personal bias, we should be wary of expressing our views on specific decisions for we may well confuse the courts in their search for an approach consistent with the rational foundations of the tax laws.

CONCLUSION

It has been emphasized recently that the public has little to do with the formulation of tax policies,[59] and that responsibility rests, indirectly, at least, in those professional tax men, the accountant, the economist and the lawyer who influence Congress and the courts.[60]

[59] Redlich, "Taxes and Politics: The Lessons of 1952," 8 TAX L. REV. 381, 397 (1953).

[60] Ibid.

Since it is apparent that responsibility will increase during the decade ahead those men must determine whether they are adequately prepared to assume it. The observations that have been drawn here indicate some disregard of that sense of responsibility in the past and a lack of preparation which may be harmful to the country in the future. Fortunately the disregard does not appear to have been willful; rather it has been unconscious, often resulting from a failure to relate specific proposals, or thoughtless observations, to basic economic, political and social principles. We can therefore look ahead with confidence in our ability to formulate the tax policies of the next decade if we are willing consciously to accept our professional responsibility, eschewing the partisan and the thoughtless, bearing in mind this observation:

> "But in the higher reaches of thought, when we come to more complicated situations, conscious resort to principles becomes necessary. To hide from ourselves the general principles that we do in fact follow, and to delude ourselves into the belief that we have no philosophy, is certainly not conducive to clear thinking."[61]

[61] COHEN, LAW AND THE SOCIAL ORDER 271 (1933).