

TAX LAW IN THE COLLEGE CURRICULUM

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The first part of this brief paper will relate some of the problems of teaching tax law in college courses. The second part will suggest some solutions to those problems.

SOME PROBLEMS

Complexity of subject matter. Teaching tax law has all the problems inherent in teaching law, plus. Law is complex, complicated and difficult. Tax law is doubly so for the reason that tax law is, in a sense, law compounded on law.

An understanding of tax law assumes an understanding of numerous other legal fields. Corporate tax planning, for example, assumes a familiarity with corporation law. Estate tax planning assumes knowledge of legal relations between spouses and their property relations. In California, for example, family tax planning encompasses applications of community property law and thus assumes basic familiarity with community property law. Distinctions in tax law between deductible expense and capital cost often are based on legal distinctions between a lease and purchase where notions of economic substance and legal form come into play. An understanding of when a non-corporate entity will be taxed as a corporation assumes a fairly complete legal knowledge of the nature of the corporate entity. Even the relatively universal notion of a husband and wife joint tax return assumes that the taxpayers are legally married.

Scope and extent of teaching. Because the subject is complex and difficult, and because it must be acknowledged that no tax course (and, in fact, no law course) can be complete, there is the ever present problem: how much? how thorough?

False sense of security. A little knowledge. Business law teachers are everywhere sincere in their desire to avoid the ever present risk that their teaching gives to students a false sense of security—that the students are learning enough knowledge and enough skills to be each his own lawyer. Tax law presents the problem in an exaggerated form because (almost) everyone in our society is a taxpayer and so to some extent must be tax knowledgeable.

Added problem: Professional use of taxation. There is a real difference between general business law and taxation in the college curricula in that general business or commercial law is not offered to students who, by virtue of the course material, will use the subject matter professionally, but taxation will be used professionally by some college students. Taxation is a recognized field of accountants'

work. Hence the college tax course is offered to some who will not use it professionally (like the business law course) and to some who will make a livelihood from tax practice. Course work offered for the purpose of teaching the knowledge and skills to students who will use their studies professionally (that is, to earn a livelihood by guiding others) has a different purpose from course work offered for the purpose of teaching some familiarity with existing rules to help the individual student in his own affairs.

Added problem: Professional uncertainty. If the college is troubled by defining its teaching province as compared with the province of the law school, the teaching profession is, to put it mildly, not helped by the uncertainty that prevails in defining areas of tax practice between the lawyer and accountant. Meetings and discussions by and between lawyers and accountants regarding their roles in tax practice are, as an accountant¹ has said, "a mighty good thing" and should, as a law dean² said, "be the subject of full and frank discussion", but the college teacher is left with few, if any, guides as to the content of his course in taxation. The proper content of the professional college course in taxation cannot await the entire solution, which may never come, of the discussions between the professions. There are students to teach who need the benefit of instruction now. They certainly cannot wait for a future inter-professional decision.

SOME SUGGESTED SOLUTIONS

*Teach normal facts.*³ College business law courses and college taxation courses frequently follow the pattern of law school courses; they are skeleton law school courses. One of the difficulties with using the skeleton of law school education as the foundation of college business law education is that law school courses are largely built upon the abnormal problem. Traditional law school education and, indeed, the traditional work of lawyers is the treatment of the unusual, the trouble case. By contrast, college education in business law ought to be concerned with the normal operation of legal facts within our society.

Law school teaching material is almost exclusively centered upon activities of people that resulted in litigation and culminated in the decision of an appellate tribunal. When the case is studied in law school, the concentration is upon some unusual, uncommon, and relatively rare factual situation in our society. Just the opposite type of factual material should be taught in college business law. The difference in teaching material should not be so much a difference in or amount of law taught as a difference in the nature of the facts taught.

In college tax law courses teach the tax consequences that flow from normal reliable business transactions and thus, incidentally, the students can learn something of the customary habits of commercial society. Normal commercial society is not necessarily simple or easy. It is often complex and involved, so I do not suggest that college tax law education is necessarily easy or elementary. The normal commercial lease of property for, say, a period of ten years, in which the tenant agrees to improve the landlord's property, maintain the property, and pay a rent

¹Queenan, *Role of Accountant in Tax Practice*, 1958 So. Calif. Tax Inst. 15.

²Griswold, *Role of Lawyer in Tax Practice*, 1958 So. Calif. Tax Inst. 1, 3.

³Brown, *A Suggestion Concerning Pre-Law School Education*, 25 So. Calif. L. Rev. 177 (1952).

based upon the tenant's gross sales, is a complicated enough teaching tool for college students. What is a customary amount of rent to pay? What are the economic, accounting, tax consequences to the landlord and to the tenant of the rent, the tenant's improvements, and the tenant's obligation to repair? I would hesitate to teach, for example, the tax consequences of uncustomary amount of rent. Teach, under present law, that April 15 or before is the proper date for filing an income tax return for a calendar-year taxpayer. Do not be concerned with teaching the consequences of the failure to file within time. Teach the usual courses of conduct of the taxpayer and the government that fit into customary patterns. Then teach that if the taxpayer desires to pursue, or if he believes the government is seeking to pursue, some unusual, uncustomary or unfamiliar course of conduct, then he should obtain professional guidance.

The uncustomary is an area in which the taxpayer should be signalled to seek professional guidance, and if there is competence to analyze the unusual, the competence lies with those who are professionally trained. Perhaps nowhere is this more true than in the tax field, in which, because of the dynamics of frequent new legislation, transactions can develop consequences extremely difficult to predict. If college students can come away with a sense of the customary, and with the knowledge that they can get professional guidance for abnormal situations, I think they will be reasonably well-equipped.

Tax law often posits that it deals with substance rather than form. The legalistic notion of substance requires analysis into business and economic realities—what it is that the taxpayer is really doing or has really done. If business college courses can teach "substance" to taxpayers, the teaching of form in which the substance should be cast can be put in the hands of law school education.

One approach to the teaching of tax accounting is to make significant comparisons and analyses of the economic, accounting and tax notions of such concepts as capital, income, expenses, reserves, depreciation and surplus.⁴ The skills used in the accumulation of data for, and the preparation of, income tax returns—a function properly within the province of accountants—can be approached by building upon accounting and auditing skills.

*Teach problem discovery.*⁵ The knowledge and skills required to discover the existence of potential or actual problems is not identical with the knowledge and skills necessary to solve such problems. If we can recognize that this distinction exists, then the area of tax law teaching for accountants can be the exceedingly important function of problem discovery and leave to the law school teaching areas of problem solution.

In terms of the value to a taxpayer, trouble discovery may be the more important contribution, albeit that in professional life clients seem insufficiently impressed with problem discovery. The skills of problem discovery can be the subject matter of tax accounting training without running into the professional controversy of lawyers' tax law. Here the tax accountant can be given special training in the recognition, among other things, of the normal as compared with the abnormal business transaction. There are certain warning signals of potential trouble about which the professionally trained accountant can learn and which, when applied,

⁴Esenoff, *Differences Between Business and Tax Accounting*, 1951 So. Calif. Tax Inst. 377.

⁵Brown, *Accountant as Problem-Discoverer*, 1958 So. Calif. Tax Inst. 27.

can be of great help to his taxpayer client. Teaching materials could be developed which can help give knowledge and skills to recognize such tax warning signals as unperformed obligations, obligations performed by another, exceptional or unusual transactions, intra-family or other related transactions, year-end signals, and substantial changes in financial position.

*The broad liberal arts approach.*⁶ There are those who would use the time allotted to law teaching in college courses to the teaching of broader sociological, political and philosophical matters. The subject of taxation forms a backdrop for such an approach. It touches about as many people in our society as does any legal field. It involves tremendous problems of the interplay of legislative enactment, executive administration, judicial application, and citizen responsibility. The concept of public policy runs everywhere in taxation.

There can be an intermixture of practical taxation with the broader liberal arts notions of teaching law. Any tax case, or any factual situation involving relationships between a taxpayer and his government, or between taxpayers themselves, offers fair territory for exploring the functions and operations of government, the nature of law, the relative responsibilities of the executive, legislative and judicial branches of government, and all the jurisprudence that students can absorb. Take the relatively simple example of the filing of a joint tax return by husband and wife: whence comes the legal requirement (legislative branch), and how enforced (executive), and how applied, if for example question should arise as to the marital status of the parties (judicial), and the nature of law (the obligation of the husband and wife being joint and several), the economics (compare the economic effect of the same income by the same taxpayers if they were not married), the dynamics of law and legislation (we did not always permit the filing of joint returns), and all the public policy that arises out of the necessity to impose taxes.

Our silent partner (the Commissioner of Internal Revenue) comes in for a participating share of many of our financial transactions. There are some in the teaching profession who wish that he would use some of his share to participate in the solution of its problems.

⁶Berman, *On the Teaching of Law in the Liberal Arts Curriculum* (1956).