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Preface

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PREFACE

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The writer of a preface, if informed in advance of the material to follow his remarks, becomes pretty well bound to the more weighty contributors. He must seek to weave a unifying web for them, admiringly point out their merits, and produce something in the way of a philosophical summary or conclusion. Such, however, is not my case. It has been impracticable for the Executive Editor to supply more than very general intimations of the ground which the others will cover. This leaves me footloose and free. I propose to exploit my freedom by writing briefly on the lawyer's functions with respect to taxation.

For very nearly 40 years it has been my lot to practice as a tax lawyer or observe others so practicing or learning to practice. During this period the place of taxation in the American scheme of life has been completely remade. In 1911 the subject came only by fits and starts to the forefront of lawyers' activity; it was, on the whole, no matter of agonized attention for citizen Joe Doakes; taxes, and most particularly Federal internal revenue taxes, had not been democratized. Nowadays even a modestly financed Joe Doakes is likely to find the operations of the Federal government taking out of his earnings as much as or more than he is able to devote to guarding the health of his children and giving them their education. Move him a little up in the income scale, include State and local taxes as well as Federal, and he may find himself contributing to governmental demands as many dollars as he spends on his whole family. The biggest single item in his budget is the tax item. What keeps him awake at night is not the problem of paying the landlord and the butcher and the grocer and his trade creditors, but the problem of having anything left after paying the revenue collector. As it goes with the client in his domestic and business capacity, so of course with the lawyer in his professional capacity. The legal practitioner dares advise no step without solemnly weighing its tax consequences; he is sometimes driven, and even more often tempted, to distort normal methods of handling his clients' affairs for purposes of tax saving.

The subtlety and comprehensiveness of taxing devices has grown with public revenue needs. Crude general property levies have, to be sure, been carried over from the 19th century. These, however, are undergoing a considerable although tardy course of refinement, and are vastly outweighted in the aggregate by a ponderous complex of income taxes, gross receipts taxes,

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sales and use taxes, death and gift taxes, and pretty-much-everything taxes. The Federal income tax of 1913 began the metamorphosis, and we have gone on from there like a rolling snowball. Tax literature has grown so great that no man can really master it. The very revenue statutes run beyond human comprehension. It was said to the writer by one who knew the facts that no single draftsman ever managed thoughtfully to consider the whole Federal Excess Profits Tax Act of 1950 before that astounding—and possibly excellent—measure was rammed through the Congress and the White House.

While the foregoing is no paean of praise, neither is it intended as a suggestion of blame. Future generations will unquestionably think they could have handled our affairs better than we did ourselves, but they will quite surely be wrong (as their own brand of future difficulties and failures will forcibly indicate). Humanity just now is in a stretch of uncommonly hard going, and instead of dealing out reproaches we should all turn to and help. As for the particular and extremely important problem of tax revenues, it behooves our learned and useful profession to put its best foot forward.

Some parts of our duty are clear enough. Uncountable thousands of taxpaying laymen will continue to seek from lawyers wise guidance in their particular tax problems. Interpretation and application of statutory provisions belong to the practice of law, and should not be delegated outside the profession. Reciprocally, the lawyer should not attempt to take over the functions of the independent and honorable calling of accountancy. Modern practice has forced him to gain some acquaintance with that art, but his duties of advocacy will not always comport with its standards of stern disinterestedness. So, too, the lawyer should hesitate to assume the economist's responsibilities. Here again he touches a branch of learning whose rudiments he has necessarily acquired, yet almost always the specialized economist will be wiser and better informed within his own bailiwick.

Down to this point, the talk has been of the legal profession at large. For immediate purposes, though, the necessity of subdivision is plain enough. The general practitioner must be separated from the tax man, the specialist. Only a specialist, devoting at least the bulk of his operative time to problems of taxation, can claim a general working grasp of the subject in its present intricately expanded form. Certainly, however, it is at once undesirable and impracticable to refer to some specialist every tax problem of every client. So it has come about that, inside the profession, tax men, with quite notable generosity, assume the responsibility of instructing general practitioners. This Tax Symposium is an illustration of that kind of adult professional education, and it is but one of many such projects in which the specialists serve uncompensated or for modest honoraria.

Beyond and, I think, above their duties to individual clients, both general practitioners and tax specialists should, in this area of work, shoulder

certain general obligations. The specialist can and ought to aid directly in the effective planning, drafting, and administration of tax law. So doing, he naturally joins other professional groups which make related contributions to effective government. One highly encouraging symptom of these difficult fiscal times is the steady increase of association by tax-skilled lawyers with accounting experts in conferences and symposia, and the constant inclusion at these meetings of government men as well as private practitioners.

Nor is the general legal practitioner excluded from an important, if indirect, share in this matter of bettering revenue operation. A lot of our tax troubles may be traced directly to the fact that we have run long on loose generalizations and short on practical working rules. Progressive rates as contrasted with the old-style flat rates, for instance, are justified under the comfortable but irritatingly vague assumption that the proprietor of a large net income or large net estate can, without denying himself or his family the reasonable necessities of existence, contribute in higher proportion per dollar to governmental costs than can a taxpayer whose means extend only into the lower brackets. But this principle sets no effective operating standard for legislation. Nobody seems to have made anything like convincing demonstration of the optimum limit for progressive tax rates or total tax burden in various connections. The word "optimum" is not used here to suggest some shadowy abstract "tax justice," about which disputants starting from different premises could wrangle indecisively until doomsday. Rather it is intended to call for answers to such mundane questions as:

(1) At what point do income tax rates on earnings get so high as to discourage or paralyze exertion by valuable creative workers?

(2) Is this point perhaps, as a sardonic playwright suggested, where the levy passes 50%, so that the worker growls out: "You take the salary and let me have the tax"?

(3) At what level does a tax on capital gains dangerously congeal realization of profits?

(4) When does taxation of investment income come so near confiscation as to displace thrift and saving by careless waste?

(5) What percentage of national income sets the top limit which over an extended period of years may safely be garnered for taxes?

(6) Are the answers to such questions reasonably constant, or do they vary with time and conditions?

The output of Butters and Lintner in the Harvard Graduate School of Business Administration has done much to suggest the technique of shaping replies to inquiries of this sort. The raw materials must be gathered from the views and particularly the actions of many individual taxpayers, the more the better. The information is hard to come by, indeed almost inaccessible on the necessary large scale to special investigation. Yet there is no need to argue the virtue of minimizing guesswork as to the con-

sequences of taxation, and affording legislators and administrators the chance to set their standards and practices by the clear light of practicality. Incidentally to serving their clients, lawyers have admirable opportunity to learn this groundwork of human fact. For the legal profession, many hands might make comparatively light work of intelligent observation and collation of such matters in the form of anonymous case studies. Combination of the resulting materials with those accessible to economists, investment counsel, accountants, and others could produce a showing of tax effects having outstanding practical value.