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Review of “Federal Income Taxation—Cases and Materials,” By Stanley S. Surrey and William C. Warren

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BOOK REVIEWS

FEDERAL INCOME TAXATION, Cases and Materials. By Stanley S. Surrey and William C. Warren. Brooklyn: The Foundation Press, Inc., 1950. Pp.xxxiv, 1166. Price \$9.00.

Perusal of this most excellent work has emboldened this reviewer to disclose to an unwilling world a conviction which has been welling up in his consciousness for some time, namely, that the concept of income, which is economic in origin, is not by itself sufficiently definitive to be used as a basis for tax liability, and that it is time to look for something else in its stead. This possibly startling thesis is nowhere stated by the learned authors of the work under review, but is simply the unwitting result of their efforts. What the authors intended to do, and did do, was to bring together within the confines of one volume what they deemed necessary to bridge the gap between the inexperience of the law school student on the one hand, and the intensely practical concept of federal income taxation on the other hand. They have succeeded most admirably in their project, and the conclusion drawn by this reviewer that the concept of income is *inherently inadequate* is strictly his own.

However, the reader will be interested in testing the truth of the reviewer's thesis because if it is valid, its formal recognition may assist students and teachers alike in reconciling themselves to the almost perverse intricacies of federal income taxation as it now actually exists.

As is the custom nowadays, this is a large book physically. Therefore, those who buy their books by the pound will feel that they have received good value. We have already indicated that the *intelligentsia* will know that have received good value. The decided cases which are included, so far as can be told without meticulous examination, seem well chosen. Many of them are merely referred to in the notes and not set out in full. These notes are termed "Illustrative material," which term is somewhat of a misnomer, for the notes are actually valuable additions in rounding out the treatment, and are not confined to mere illustrations. Casebooks in general have been shifting their emphasis from adjudicated cases to text matter. The work under review is no exception.

It is gratifying to observe that the authors have made a clean break with the practice, which has heretofore obtained in most instances, of phrasing the annotations in a casebook as unanswered questions. One of the authors of the work under review assured this reviewer before publication that the matter was under serious consideration, and it is indeed a pleasure to see that it was decided by the authors that a book can be written without obscure and sometimes probably unanswerable questions being interspersed among the decided cases. The practice referred to was simply one example among many of the school of thought that if an author was obscure enough some folks might be led to conclude that he was learned.

There is another innovation in this book which may not be universally approved. We refer to the inclusion of a verbatim report of colloquies

before Congressional committees, such as the parliamentary fencing¹ between Assistant Attorney General Jackson and Congressman Treadway in connection with Mrs. Roosevelt's famous income tax ruling. It will be remembered that this ruling was to the effect that Mrs. Eleanor Roosevelt was not taxable upon the proceeds of her radio broadcasting which were devoted to charity, regardless of the fifteen per cent limitation which applied to common people.

The fact that the ruling was later changed prospectively only² may indicate that the sly digs at this ruling were not entirely unjustified. All of the colloquy makes interesting reading, but the question now raised by this reviewer is whether it is the kind of material which should be included in a casebook for students or whether on the other hand, it would not be better simply to indicate that such material exists for the benefit of those who are curious enough to want to read and enjoy it, and let the sly digs be furnished by the instructor *ad libbing* as he teaches the course.

Another innovation is the practice of including lengthy quotations from law review articles or books such as the discussions by Norris Darrell³ and by Randolph Paul⁴ concerning the responsibilities of a tax adviser. Without questioning in any wise the eminence of these authorities and the weighty wisdom which is included in these extracts, would it not be well enough again to let the teacher tell his students about the ethical responsibility of a tax adviser without burdening the record, so to speak, with such lengthy extracts? A teacher on taxation should certainly give his students a definite philosophy of right and wrong in tax matters.

The book is divided into ten chapters, exhibiting various facets of income taxation, such as "Gains and Losses From the Disposition of Property,"⁵ and "Taxation of the Family,"⁶ to mention but two. It does not appear to this reviewer that the ten chapter headings comprise all the aspects of federal income taxation. Rather, they are important aspects which the authors decided, for reasons deemed sufficient to them, to include in the book. This exemplifies a fault of the casebook system and is not peculiar to the work under review.

In searching for instances to prove the thesis stated in the first paragraph, which this reviewer realizes may strike some as a bit iconoclastic, it has been difficult to select from the many examples, all of which would equally serve the purpose.

Chapter 6, Section 6, deals with nonrecognition of gain or loss on certain dispositions. This chapter would seem to point up the fact that the economic concept of income does not set a clear boundary between income and capital. On the contrary, in economics, income and capital merge imperceptibly into one another. The value of property as capital has been defined as the arithmetical sum of all the income that may be derived in

1. p. 641.
2. U.S. Treas. Reg. 111, § 29.22 (a) 2(1951), T.D. 5151, P-H 1951 FED. TAX SERV. ¶7603 (1951).
3. p. 57.
4. p. 63.
5. Chapter 6, p. 422.
6. Chapter 7, p. 577.

the future from the property, reduced to its present value by an interest factor to reflect the fact that the income will be received at a later date.

In order to produce a workable income tax, Congress has found it necessary to go into great refinements as to what conversions or exchanges of capital result in taxable income and what do not. The section referred to⁷ deals with many of these refinements.

In the chapter on deductions we again have⁸ a demonstration of the wide variety of considerations which are involved in the determination of net income for the purpose of taxation. This fact is particularly noticeable in the portion devoted to expenses of an individual.⁹

When one considers such things as the "deductible profit seeking expenses of an individual versus his nondeductible personal expenses,"¹⁰ it becomes clear that the economic concept of income has been left behind. The economist thinks one has become richer by "income" entirely aside from the collateral question of whether the individual derived any fun from his activity. For example, if one engaged in the raising of tropical fish, and his activity did not leave him any better off at the end of the year than he was at the beginning, the economist would not be concerned as to the composition of the items of receipts and disbursements, yet the tax collector might.

The well known case of *Commissioner v. Flowers*¹¹ will serve as well as any to illustrate the point. The taxpayer was general counsel for the Gulf, Mobile and Ohio Railroad. While the main office of the railroad was at Mobile, Alabama, the taxpayer, for his own reasons, continued to reside in Jackson, Mississippi. It was agreed with the railroad that he might do so, but he agreed to pay his travel expenses between Jackson and Mobile. The distance is about 323 rail miles. The taxpayer made many trips during the taxable years in question and claimed a deduction for traveling expenses and for meals and hotel accommodations while in Mobile. The Supreme Court of the United States, by a divided Court, held that such expenses were not deductible. This was the legal decision and became the law of the land.

An economist would have no difficulty, presumably, in arriving at the conclusion that the gain which Mr. Flowers derived from serving as general counsel of the railroad could only be stated after taking into account the expenses which he had for meals and lodging in Mobile and his traveling expenses. The highly refined discussion in this case as to what constituted a man's "home" and just how he happened to live so far from his work would not be pertinent in the eyes of an economist, but, of course, was quite pertinent in connection with the tax liability.

The conclusion seems to follow that the concept of "income" to be used as a basis for the issuance of a tax bill needs to be bolstered up and supplemented by many refinements that are not needed for a useful economic concept of income.

7. Chapter 6, Section 6, p. 540.

8. Chapter 3, p. 150.

9. Chapter 3, Section 2, p. 185.

10. Chapter 3, Section 2B, p. 192.

11. 326 U.S. 465 (1946), Casebook, p. 193.

The authors give some definitions of income¹² classified as definitions of (a) the economists, (b) the courts and (c) the legal texts. Without going into detail, it may be said that these various definitions lead the reader to the conclusion that the term "income" is anything but definitive.

Professor Carl Plehn's three characteristics of income are referred to.¹³ These three characteristics are: (a) receipt, (b) anticipated recurrence and (c) expendibility. The authors clearly show by examples the correctness of their view that these three criteria cannot be used to determine taxable income as such. They also refer¹⁴ to the "net accretion" concept, whereby all types of receipt or accrual in purchasing power to the individual between two points would be included in income, less expenditures necessary to obtain this income. The authors point out that it would include, among other things, receipts from inheritances and gifts, appreciation or depreciation in capital assets (whether realized or not) and the money value of various types of real income which are included in the "service flow" concept. The service flow concept is described at page 143 as "the value of goods and services consumed by an individual in a given time period."

Passing to the definitions of the courts and the legal texts, one is more and more persuaded that "income," as such, is not an entirely definitive concept.

Perusal of the book as a whole and of the various chapters may lead the reader to the conclusion that, far from being the perfect tax that it was once acclaimed to be, the income tax has developed into a monstrous thing which would probably not have been tolerated if it had been thrust full-blown upon an unwilling public.

Possibly few persons realize what is the basic reason for the development of the many refinements which have converted what seemed to be a simple and ideal tax into a system of laws which has well been described as "so complicated that it takes a priesthood to practice it." This basic reason is, that the concept of income is *economic* in its origin and is not *in and of itself* sufficiently definite to be used as a basis of legal tax liability. It has, therefore, been necessary to supplement, improvise and otherwise amplify to such an extent that the end result is the complicated and unwieldy structure which now constitutes our federal income tax law, and which is so well reflected in the work under review.

Our attitude toward these refinements and the various court decisions on them would be more sympathetic and less cynical if we could but realize that the difficulty arises from the adoption of an unsuitable criterion ("income") as the measure of the tax liability. The mere fact that by "blood and sweat and tears" we have finally made it into a reasonable facsimile of a proper criterion is beside the point. The stark, unpalatable fact is that the concept of "income" has been snatched from the environment of economics, where it was useful and workable, and made to perform a duty for which it was not intended and which, in fact, of its own, it cannot perform.

In the work under review, we have possibly the best job that can be done

12. Chapter 2, Section 6, p. 142.

13. p. 144.

14. p. 145.

in putting the federal income tax law into one volume for teaching purposes. But after one finishes reading the book, he still may have the feeling that something remains unsaid; that, actually, the situation is not quite the imponderable mass which it seems.

If the student can be led to realize that the refinements which have been added are superimposed upon the economic concept to make it perform a new function; then, he will realize that in this field there is not necessarily only one right answer. In many instances all of the answers are improvisations or stopgaps. Therefore, the only criterion available is: Which one will work best?

Whether the authors would have cared to take the step of introducing a philosophy of taxation, or whether it would have been desirable is, of course, an open question; but with this possible exception the book is a valuable and useful teaching tool.

The preface states that a shorter one volume version to encompass both income and estate taxes is under preparation, which will permit the treatment of the three taxes, federal income, estate and gift, in one short course of about forty-eight hours. This might be valuable under certain circumstances; the longer treatment consuming two semesters, one devoted entirely to treatment of the income tax, and the other to estate and gift taxation, seems much more preferable, and such a two-semester course should be supplemented, no doubt, by seminars. Since less than half of the volume can be covered in a course of forty-five hours, this leaves untouched ample material for such seminars by simply using the portions omitted in the regular course.

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