

## BOOK REVIEWS

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**The Federal Income Tax.** By Roy G. and Gladys C. Blakey. New York: Longmans, Green & Co., 1940. Pp. xvii, 640. \$7.50.

This is a real book, written solidly and soundly. The learning and wisdom it contains have ripened slowly and well during the whole operative period of modern federal income taxes. Combining practical experience with scholarly research, the authors have kept their feet on the ground and their heads out of the clouds. This in itself makes the volume highly acceptable to the lawyer, and another strong recommendation can be added. Both advocate and legal adviser must meet situations as they come, shaping argument and action to fit the peculiar needs of each case. Only by rare coincidence will ready-made theories or contentions about taxation or any other subject serve this purpose. But information, exposition, the story of what happened and why, and what it means, the lawyer must have as his starting basis. Exactly this the Blakeys supply with reference to the income tax. Their aim is to tell and explain fiscal history, not to wrangle over it. Sometimes their own views appear inferentially, more rarely by direct comment, but the impression consistently conveyed is that of well-rounded objective statement.

The scheme of development splits the book into two parts. The first and longer of the two is a running presentation of the legislative, administrative, and judicial development of national income taxation from Civil War days through the struggles centering about 1894-5 and 1909-13 and every subsequent revenue act to the end of 1939.<sup>1</sup> The interplay of political and economic forces is described; legislative marching and countermarching, committee reports, congressional debate, and executive attitude and influence are reviewed; and popular reactions are indicated. The authors draw their material from conventional legal sources, from newspapers and periodical literature, from political biography. They are also able to employ significant unpublished statements, notably one from Cordell Hull, and their own direct personal knowledge on many points.

It is a skillfully condensed and colorful recital. Human interest and the personal factor abound. Theodore Roosevelt makes one explosive appearance and then turns off the thunder; William Howard Taft moves large and jovial on his persuasive way; Elihu Root displays his political acumen, his skill in draftsmanship, and his analytical penetration; the LaFollettes, father and son, fight the battle of liberalism; Woodrow Wilson delivers his stirring revenue message of May 27, 1918; the irate Senator Couzens murders Secretary Mellon's beauty sleep; Franklin D. Roosevelt intermeshes revenue raising and social control; Huey Long struts and schemes and filibusters. Dozens of other well-known or well-remembered actors speak their lines and play their parts. This kind of fiscal history is fun.

<sup>1</sup> This part of the book is a good complement to the latest edition of Barton and Browning, *Federal Income and Estate Tax Laws*, which cuts across the chronological grain of legislation. The Blakeys, while less precise and detailed in their history of statutory sections than Seidman, *Legislative History of Federal Income Tax Laws* (1938), tap far more varied source material.

The second part of the book is a summarized treatment of particular topics and problems. The bulk of this part lies between pages 478 and 577, in which space the authors deal with the evolving definition of taxable income, the question of rates and exemptions, the whole field of administration, and a series of suggestions for statesman-like evaluation of the income tax. Other discussion belonging in the same category, although placed ahead for sound reasons, covers the matters of social security<sup>2</sup> and intergovernmental immunities.<sup>3</sup> It should be added that throughout the volume and in an appendix appear charts, diagrams, and tabulations which serve as summaries of various aspects of matters discussed. At many points in the summations, the authors must have been tempted to "sputify" as well as specify. They adhered, however, to their role as expositors of history. In consequence, the final chapter heading—"Conclusion"—cannot be deemed the terminus either of their thought or of the reader's, but simply the end of this presentation of material for thought.

The scheme of the book is so well conceived and executed as to leave little opening to broad adverse criticism. Those topics chosen for summarization are, it will have been noticed, far from numerous. Certainly no worthy history of the federal income tax could risk omission of any of the selected subjects. But how about the omission of certain other vexed questions? It would do a lot of us good, for instance, to be led through the maze of accountancy connected with the income tax. Perhaps the Blakeys will reply: "Page George O. May; we have no intention of attempting to gild his lilies." To try again, how about some further light upon problems of draftsmanship? Here we are, dealing with a vast aggregate of statutory provisions, overlaid by intricate administrative regulations, the whole so delicately balanced at innumerable points that the careless touch of profane amendatory hands may work disaster. Ought we not to be told about Middleton Beaman and his skilled associates in the Office of Legislative Counsel; about the technical staff of the Joint Committee on Internal Revenue Taxation; and about the large body of expert draftsmen working in the Treasury and the Bureau of Internal Revenue? To which inquiry it may be the authors will answer: "We have told you a good deal about all these agencies, if you will take pains to piece our references together;<sup>4</sup> further elaboration would be caviar to the general, and we have not pretended to write for specialists." Then there is the troublous matter of capital gains and losses, subject to so much controversy and the source of so vast a literature that many who have to deal with income taxation are thoroughly lost in the maze. The book necessarily touches this topic at numerous points, but does not contain a unified comprehensive discussion. Possibly it was decided that such discussion, if truly adequate, would have to be so lengthy as not only to expand the volume beyond moderate size but even to unbalance the plan of presentation. Following that conclusion, the most of which should have been ventured was a summary tabulation of the capital transaction provisions of the successive revenue acts, and this tabulation has been inserted.<sup>5</sup>

<sup>2</sup> P. 390 et seq.

<sup>3</sup> P. 457 et seq.

<sup>4</sup> This is true; and what is more, they have indexed most of their material so that it can be turned up. See the index headings "Joint Committee on Internal Revenue Taxation" and "Legislative Drafting Service"; also pp. 219, 226, 348, 352 n. 10, 372, 406, 431, and 499-500. But there is no reference to the standard articles; viz., Moore, Foreword to the Office of the Legislative Counsel, 29 Col. L. Rev. 379 (1929); and Lee, The Office of the Legislative Counsel, 29 Col. L. Rev. 381 (1929).

<sup>5</sup> Pp. 586-8.

Minor specific criticisms amount to little. Case citations do not always adhere meticulously to the best form.<sup>6</sup> Inconsistent and partially inaccurate statements appear about taxation of intercorporate dividends.<sup>7</sup> The summary of *Brushaber v. Union Pacific R. Co.*<sup>8</sup> does not explain the problem which so disturbed Chief Justice White and which he met with such clumsy turgidity,<sup>9</sup> although a pair of later passages<sup>10</sup> do suggest this problem. *Eisner v. Macomber*<sup>11</sup> is not adequately followed through later litigious developments.<sup>12</sup> Surtax rates under the Revenue Act of 1934 are stated inaccurately on one page<sup>13</sup> but correctly in a subsequent tabulation.<sup>14</sup> Senator Hastings does not appear as a member of the Senate Finance Committee in 1936,<sup>15</sup> although correctly referred to as author of a minority report.<sup>16</sup> The provision of the Revenue Act of 1937 which modified the \$1,000 "personal exemption" of trusts is inadequately paraphrased.<sup>17</sup> The effect of the amendment to the closing agreement

<sup>6</sup> P. 57 n. 144 correctly states that *Connecticut Gen'l Life Ins. Co. v. Eaton* was affirmed, but does not give the citation (*Eaton v. Connecticut Gen'l Life Ins. Co.*, 223 Fed. 1022 (C.C.A. 2d 1915)) of the affirmance. P. 333 n. 136 gives the date of the Supreme Court's decision in *O'Malley v. Woodrough* as May 24, 1939; p. 483 n. 14 correctly dates the case May 22, 1939. P. 388 n. 17 dates *Steward Machine Co. v. Davis* in 1939 instead of 1937. Dates are not given at all for a good many of the cases cited. A number of Supreme Court cases are listed with only the unofficial citations, although the latest official citations were available well before the end of 1939. See pp. 293 n. 60, 333 n. 136, 384 n. 8, 388 n. 17, 462 n. 19, 467 n. 36, 483 n. 14, and 497 n. 59.

<sup>7</sup> E.g., pp. 97 (last paragraph), 100 (last full paragraph), 143 (last full paragraph), and 155 (next to last paragraph), which are correct. But see pp. 404 (text and n. 10) and 523, which seem incorrect.

<sup>8</sup> 240 U.S. 1 (1916); pp. 101-2.

<sup>9</sup> 240 U.S. 1, 11-19 (1916). The embarrassing series of propositions was: (1) the Pollock case declares a tax upon income derived from property to be a direct tax; (2) therefore the sole express constitutional restriction upon such a tax has been the requirement of apportionment; (3) but the Sixteenth Amendment has wiped out that requirement; (4) consequently the income tax, or at least a substantial part of it, is constitutionally unbridled. The Chief Justice's answer was that the Sixteenth Amendment returned the income tax lock, stock, and barrel to the category of indirect taxes, restricted by the rule of geographical uniformity. See also his outburst on the same point in *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916), where he accuses the majority in the Pollock case of "testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed."

<sup>10</sup> Pp. 465-6 and 482 n. 9; an amusing misprint near the top of p. 466 substitutes "Hark" for "Mark" and imports a jauntily poetic air into a ponderous judicial quotation.

<sup>11</sup> 252 U.S. 189 (1920).

<sup>12</sup> Pp. 115, 120 n. 73, 404 n. 8, 483, 497, 503 (n. 81 on this page says "taxable" when "non-taxable" seems the proper word), and 506. The final cases of the series are *Helvering v. Gowran*, 302 U.S. 238 (1937), and *Helvering v. Pfeiffer*, 302 U.S. 247 (1937), which led to the fascinating draftsmanship in Internal Revenue Code, §§ 113 (a) (19) and 117 (h) (5); cf. Revenue Act of 1939, § 214 (e) and (f). See Seghers, *Determination of Gain or Loss Upon the Sale of Stock or Stock Rights*, 18 *Taxes* 11 (1940); Eichholz, *The Revenue Act of 1939 and the Basis of Stock Dividends and Rights*, 40 *Col. L. Rev.* 404 (1940); and James, *The Present Status of Stock Dividends under the Sixteenth Amendment*, 6 *Univ. Chi. L. Rev.* 215 (1939).

<sup>13</sup> P. 363.

<sup>14</sup> P. 515.

<sup>15</sup> P. 414 n. 29.

<sup>16</sup> P. 420.

<sup>17</sup> Pp. 432 and 434; cf. p. 452. The authors do not allow sufficiently for lawyers' ingenuity in dealing with the words "and there is not distributed an amount equal to the net income" in

provision by the Revenue Act of 1938 is stated much too narrowly as though it were intended to apply only in basic cases;<sup>18</sup> the intention was at all times far broader, and the wording corresponds.<sup>19</sup> In connection with the discussion of taxes on gross receipts, gross income, net income, and clear income,<sup>20</sup> the authors might well have mentioned *Stewart Dry Goods Co. v. Lewis*,<sup>21</sup> even though *Minnesota v. National Tea Co.*<sup>22</sup> has indicated that the standing of the *Stewart* case is precarious. The authors say that "since 1935, there seems to be little or no excuse for retaining a double system of rates and distinguishing between a normal tax and a surtax on individuals."<sup>23</sup> Excusable or not, this is a mighty good method of extracting a bit more revenue so long as federal bonds are outstanding which bear interest exempt from normal tax only.<sup>24</sup> In connection with the distinction between "avoidance" and "evasion"<sup>25</sup> the best modern dissertation<sup>26</sup>—indeed, probably the best job ever done on this hard topic—should certainly have been cited.

But these are "fly-specks on the sun," as John Chipman Gray once said when criticizing an important book, and a fair review of *The Federal Income Tax* must close with greater dignity. Professor and Mrs. Blakey thoroughly and vividly remind us of the hard emergencies through which national income taxation has already passed. It came down the last quarter-century staggered at times not only by overload but by political cowardice, by stupidity, by sectional selfishness, by intellectual dishonesty, by proposals unsound almost to the verge of lunacy, yet somehow keeping its feet. Men of moral courage, wisdom, and increasing expertness have supported and shaped it, although often their views prevailed far too tardily or by dangerously narrow margins. At best, we shall soon have to stop playing Macawber and resolutely balance our budget; at worst, grimly finance another war, starting the job deep-sunk in debt. For either purpose the income tax in some form must be our main fiscal reliance. The Blakeys will have rendered no mean service if their book helps drive home a sense of the deadly risk in paltering with the situation.

JOHN M. MAGUIRE\*

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§ 401 of the act. This whole episode, which continued into 1938, suggests that everybody was badly misled or that somebody was being hoodwinked. See H. Rep. 1860, 75th Cong. 3d Sess., at 46 (1938); Internal Revenue Code, § 163(a).

<sup>18</sup> P. 453; Revenue Act of 1938, § 801; Internal Revenue Code, § 3760.

<sup>19</sup> For example, the closing agreement section was intended to help on the pestiferous problem of timing bad debt deductions; and it has a vital bearing upon the intricate "mitigation" provisions of Internal Revenue Code, § 3801.

<sup>20</sup> Pp. 483, 484, 486 n. 22, and 506.

<sup>21</sup> 294 U.S. 550 (1935).

<sup>22</sup> 60 S. Ct. 676 (1940).

<sup>23</sup> P. 520.

<sup>24</sup> See the list in C.C.H. Federal Tax Serv. ¶ 107, pp. 1305-10.

<sup>25</sup> P. 556, particularly n. 38.

<sup>26</sup> Paul, *Studies in Federal Taxation 9-157* (1937). Paul's work generally is ignored, save for the citation on p. 613 of Paul and Mertens, *The Law of Federal Income Taxation* (1934-8).

\* Professor of Law, Harvard University Law School.